following-named and described dome-tic corporations authorized to do business in this State have failed, after due notification, to comply with the provision of Sec. 8978 of Act approved March 20th, 1907, by making and filing in the office of the Secretary of State the affidavit therein required to be made and filed for the current year.

Corporation No.	Name of corporation.	Date of incorporation.	Location of principal office.
1913–½	Mallinckrodt Chemical Works.	Apr. 18, 1882	St. Louis

In Testimony Whereof, I hereunto set my hand and affix
40 the Great Seal of the State of Missouri. Done at the office *of* the City of Jefferson, this 1st day of Sept., A. D. 1910.

[SEAL.] CORNELIUS ROACH,
Secretary of State.

This is all the evidence introduced by the plaintiff in chief.

The defendant, to sustain the issues on its part, offers and introduces evidence as follows:

OSCAR L. BIEBINGER, sworn for defendant, testifies as follows:

Direct examination, by Mr. BARCLAY:

Q. Please state your name, age, residence and occupation.

A. Oscar L. Biebinger; age 51; reside in St. Louis; am secretary of the Mallinckrodt Chemical Works.

Q. You reside at Ferguson, St. Louis County, do you not?

A. Yes, sir.

Q. How long have you been secretary of the Mallinckrodt Chemical Works?

A. I don't remember exactly, about 20 years.

Q. Who has charge of the matter of making official reports required from time to time by the Secretary of State of Missouri?

A. I have had.

Q. For several years?

A. Yes, sir; quite a number of years.

Q. Did you observe that at the time the depositions were read a certain blank was offered in evidence by the plaintiff which is called Exhibit C; I show you *that* the affidavit on each side of that I wish to call to your attention. Do you remember having made a report in regard to the Mallinckrodt Chemical Works upon a blank
41 of that character containing a blank on one side under the anti-trust law and on the other a report under the domestic corporation law?

A. Yes, sir.

Q. Did you fill up one of the blanks in regard to the report as a domestic corporation?

A. Yes, sir.

Q. And forwarded it to the Secretary of State?

INSTRUCTIONS

A. Yes, sir.

Q. Do you remember about the time when that was done by you?

A. I don't know exactly, I think some time somewhere between July 20th and 25th, it may have been the 1st of August.

Q. Some time in July or early in August?

A. Yes, sir.

By the COURT:

Q. Which affidavit was it you filled up?

A. The statement.

By Mr. BARCLAY:

Q. The report of the corporation as a domestic corporation?

A. The annual report.

Q. The annual report of the Mallinckrodt Chemical Works as a domestic corporation. Was any second blank of either character returned to you by the Secretary of State during that time in the year 1910?

A. No; I never received any; never saw any or heard of it.

Q. Did you receive an acknowledgment from the Secretary of State of the papers you forwarded?

A. I did.

Q. Is that the card that came (handing same to witness)?

A. I should judge it to be the card.

Q. Is the date of your own acknowledgment marked on it by a stamp?

A. Yes, sir.

Q. What is the date?

A. Received August 6th, 1910.

Q. What is the post mark of Jefferson City at the time that was sent?

A. August 5th, 11 p. m.

Q. 1910?

A. Yes, sir.

42 Defendant's counsel offers in evidence the card referred to in words and figures as follows, to-wit:

DEPARTMENT OF STATE,
JEFFERSON CITY, MO., *Jul-* 22, 1910.

GENTLEMEN: I have today received and filed your annual report for 1910, as required under provisions of Art. I, Chap. 33, R. S. 1909. Also, your anti-trust affidavit for 1910, as required under provisions of Sec. 10322 R. S. 1909.

Respectfully,

CORNELIUS ROACH,
Secretary of State.

Cross-examination by Mr. FERRIS:

Q. Did you make out any affidavit as required by the anti-trust law of this State in 1910?

A. Not that I know of; I did not.

Q. You are the officer who signed and subscribed to the annual report which you have referred to, are you not?

A. The report of the corporation, yes.

Q. At that time you did not make out any anti-trust affidavit?

A. No, sir.

Q. You knew, as a matter of fact, that such affidavit was called for by the Secretary of State, didn't you?

Defendant's counsel objects to the question as immaterial.

The COURT: He may state what he observed, the report being on one side of the paper and the other on the other side.

Defendant at the time duly excepts.

Q. You made out the annual report which you have referred to on a sheet such as is in evidence here as Exhibit C, on the reverse side of that?

A. Yes, sir.

Q. When you made out that report you saw the blank
43 form on the other side of the blank report including the affidavit, didn't you?

A. Yes, sir.

Q. You went before a notary public—called on a notary public and made affidavit to the report on one side?

Defendant's counsel objects to the question as the paper speaks for itself.

The COURT: He may identify the paper and show it is the paper.

The WITNESS: I made the affidavit; yes.

By Mr. FERRIS:

Q. You made the affidavit to the report you sent it?

A. Yes, sir.

Q. But you did not make any affidavit as to being in a trust or violating the anti-trust law in this State?

A. No, I didn't make the other one.

Q. You intended not to make the other one, did you not?

Defendant's counsel objects to the question as immaterial; objection overruled; defendant at the time duly excepts.

A. I didn't make it.

Q. You failed to do it intentionally, didn't you?

Defendant's counsel objects to the question as immaterial.

The COURT: He says he saw it and did not make it; now he may state why.

Defendant at the time duly excepts to the ruling of the Court.

The WITNESS: Yes, I omitted it.

By Mr. FERRIS:

(Q.) On purpose?

A. Yes.

Q. It is a fact, is it not, that your corporation as a corporation refuses to make the anti-trust affidavit required by the laws of the State?

44 Defendant's counsel objects to the question as having nothing to do with the case whatever; objection overruled; defendant at the time duly excepts.

Q. You have stated that you purposely refrained from filling out and swearing to the affidavit on the reverse side of the report; state what your purpose was in thus refraining from doing it?

Mr. BARCLAY: We object to any inquiry as to the purpose of the act. If he was lawfully entitled to do so it makes no difference whether he purposely did it. We claim he was not obliged to do so for various reasons.

The COURT: It may be for some reason of his own, or that the president or board of directors instructed him not to make it out. If he had any instructions it would be proper to show them.

Mr. BARCLAY: That question has not been asked him.

The COURT: He may state how he came to omit the execution of the affidavit on the other side.

Defendant at the time duly excepts to the ruling of the Court.

Mr. FERRIS: He stated he purposely omitted it; now he may state what his purpose was.

Defendant's counsel objects; objection overruled; defendant at the time duly excepts.

The WITNESS: I did not believe we were obliged to answer it.

Q. You didn't think your corporation was subject to the requirements of this law?

Defendant's counsel objects.

Q. For what reason did you think you were not obliged to make the affidavit?

Mr. BARCLAY: I object.

45 The COURT: If he was so advised by his counsel he may answer in that way.

Mr. BARCLAY: He has not said that.

The COURT: He has stated he intentionally omitted, as I understood, to execute this affidavit or report. Now if there was any particular reason to move him at that time he may state what the reason was.

Mr. BARCLAY: The Supreme Court has held if his act is lawful it is immaterial what his purpose was.

The COURT: I think he may answer subject to the objection if he had any reason for failure to comply with the law which is valid on its face.

Defendant at the time duly excepts to the ruling of the Court.

The WITNESS: I only did it on the general theory that we did not have to make answer to everything asked us.

By Mr. FERRIS:

(Q.) I will ask you if you were instructed by your corporation in respect to making out corporate reports and affidavits?
A. No, sir.
Q. Did the board of directors ever have up the question of making the affidavit under this law?

Defendant's counsel objects to the question on the ground with the record of the corporation would be the best evidence; objection sustained.

Q. When you say "We did not think we had to make answer to all these questions" whom do you refer to when you say "we"?
A. I guess myself.
Q. What are your duties as secretary of the corporation?
A. They are generally executive.
Q. You are the person really in the active executive management of the corporation?
A. Very largely in connection with others.
46 Q. And were so in the year 1910, were you not?
A. Yes, sir.
Q. I will ask you if in any former year any such affidavit under this law was made by or for your company and filed with the Secretary of State?

Defendant's counsel objects to the question as immaterial; objection sustained.

Q. You do not claim as a matter of fact that you have put on file in the office of the Secretary of State an affidavit such as referred to here as Exhibit C, and such as you returned blank; you do not claim you have filed any such report for the year 1910?

Defendant's counsel objects.

The COURT: He may state whether he has filed it.
Mr. BARCLAY: He has stated he did not prepare such an affidavit
Mr. FERRIS: I ask if he knows it was filed on any other blank.

By the COURT:

(Q.) Did you file any such report?
A. No, sir.
Q. Any affidavit or any sworn statement for the year 1910?
A. So far as I am concerned, no.

By Mr. FERRIS:

(Q.) If any such thing has been done you have not heard of it?
A. No, not for the year 1910.
Q. So far as you are concerned it is not the policy or intent of the corporation to file any such affidavit now?

Defendant's counsel objects; objection sustained.

Defendant's counsel offers in evidence the card before referred to, which is marked Exhibit Z, and is in words and figures as follows, to-wit:

47 [Exhibit Z, here offered, and called for in the bill of exceptions, is not reprinted because same appears at p. 32.]

Mr. FERRIS:

(Q.) Now, did that postal card come to you?
A. Yes, sir.
Q. You had charge of the mail for the Mallinckrodt Chemical Works when the card was received by you?
A. The mail was passed up to me—all important items.
Q. You saw the card when it was received, did you not?
A. Yes, sir; I got it.
Q. It was received after you mailed the report that you spoke of?
A. I judge so.
Q. Did the corporation receive, to your knowledge, any other receipt for the report which you mailed to Jefferson City?
A. No, sir.
Q. You will see on the receipt side of the card it is dated July 22nd, 1910, is it not?
A. Yes, sir.
A. It was about that time you mailed the report to which I referred?
A. I could not tell you definitely; it would be along there somewhere.
Q. You never mailed but one?
A. No, sir.
Q. You received that about the 1st of August?
A. Yes, sir.
Q. It is dated July 22nd?
A. The 6th of August. When the mail comes in we stamp it.
Q. Did you read that when it came in?
A. I glanced at it; I knew what it was.
Q. Did you notice it said the Secretary of State had received the affidavit?
A. Yes, sir.
Q. You noticed it at the time?
A. I can't tell.
Q. When did you notice it?
A. Yesterday.
Q. You made inquiry among the officers as to whether any other was sent?
A. No, sir.

48 The COURT: As I understand him, he does not claim the corporation made the other affidavit.

By Mr. FERRIS:

(Q.) This was received by you at the time you have spoken of?
A. August 6th.

Q. It is postmarked Jefferson City, August 5th, and dated Jefferson City, July 22nd, 1910?

A. Yes, sir.

Q. No other receipt has been received by your company on account of reports or affidavits for the year 1910?

A. I have not seen any of them.

Q. In the course of your business you attend to such things and they come under your supervision?

A. One might slip by and I not notice; I think it is possible it may be so.

This was all the evidence introduced in the case.

Whereupon the defendant prayed the Court to declare the law to be as follows:

I.

The Court declares the law to be that under the pleadings and evidence the plaintiff is not entitled to recover and the finding should be for defendant.

II.

The Court declares the law to be that under the 14th Amendment of the U. S. Constitution, "No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws," and that the rights of defendant under that amendment are infringed and invaded by this action in so far as the same may be intended to punish or to impose any forfeiture on defendant for failure to make such affidavit as is mentioned in section 10322 (Mo. R. S. 1909).

III.

The Court declares the law to be that there is a defect of
49 parties plaintiff, in that the State is not averred in the body of the petition as the plaintiff in the case, as required by law; and accordingly the finding should be for defendant for the aforesaid reason.

IV.

The Court declares the law to be that if the Court finds from the evidence that the blank for the affidavit was not mailed to defendant on or about July 1, 1910, but at least ten days before that date, then said blank was mailed too late; and as the statute counted on by relator are penal in nature, the finding should be for defendant.

V.

The Court declares the law to be that if the Court finds from the evidence that only one paper, with blanks thereon for both agents, was forwarded to any officer of defendant in 1910, and that defendant duly made one report or return thereon (as a domestic corporation) and that the same was received by the Secretary of State on or about July 22nd, 1910, and filed in his office, and that the time allowed by law to file the affidavit under section 10322 had

not then expired, and that no other or separate blank affidavit for use by defendant within the time prescribed for returning same was furnished to defendant, for use within that time, then the finding of the Court should be for defendant, under the pleadings and evidence in this cause.

VI.

The Court declares the law to be that under the Constitution of Missouri defendant could not lawfully be compelled to file said affidavit as required or requested according to the allegations of said petition, and any attempt to compel defendant so to do is a violation of its rights under section 23 of the second article thereof.

Which declarations of law the Court refused to give, to which action of the Court the defendant, by its counsel, then and there duly excepted separately to refusal of each request therefor.

50 And thereafter, on October 30th, 1911, the Court found the issues in favor of the plaintiff, filing the following memorandum:

Judgment for plaintiff.

The charter and certificate of incorporation of the defendant are forfeited for its failure and refusal to comply with the laws of Missouri concerning pools, trust and combines.

R. S. Mo. 1909, sections 10322 to 10328.

The Supreme Court of Missouri has repeatedly upheld the validity of the anti-trust laws under which the defendant is being prosecuted.

State ex inf. v. Fireman's Fund Ins., 152 Mo. 1.
State ex inf. v. Continental Tobacco Co., 177 Mo. 1.
State ex rel. v. Armour Packing Co., 173 Mo. 356.
State ex inf. v. Standard Oil Co., 194 Mo. 148.
State ex inf. v. Standard Oil Co., 218 Mo. 1.

To which finding, memorandum, ruling and declaration of law defendant duly excepted at the time.

On the 31st day of October, 1911, at the same term of court, and within four days after the finding, the defendant filed its motion for a new trial, which, omitting caption and signature, is as follows:

Motion for New Trial.

Comes now again said defendant, by its attorneys, and moves the Court to set aside the finding and verdict herein and to order a new trial in the above-entitled cause of State ex rel. v. Mallinckrodt Chemical Works, defendant (No. 67352-A) in said circuit court, and as grounds of this motion defendant, by its attorneys, assigns the following, to-wit:

1. The Court erred at the trial in refusing to give the first request for an instruction or declaration of law as asked by defendant.

2. The Court erred at the trial in refusing to give the second request for an instruction or declaration of law as asked by the defendant.

51 3. The Court erred at the trial in refusing to give the third request for an instruction or declaration of law as asked by defendant.

4. The Court erred at the trial in refusing to give the fourth request for an instruction or declaration of law as asked by defendant.

5. The Court erred at the trial in refusing to give the fifth request for an instruction or declaration of law as asked by defendant.

6. The Court erred at the trial in refusing to give the sixth request for an instruction or declaration of law as asked by defendant.

7. The Court erred in refusing each one of the declarations of law or instructions asked for defendant.

8. The court erred in finding for plaintiff, because such finding is against the evidence.

9. The Court erred in not finding for defendant upon the admitted facts in evidence.

10. The Court erred in admitting incompetent testimony on behalf of plaintiff and relator at the trial.

11. The Court erred in admitting at the trial irrelevant testimony on behalf of plaintiff and relator.

12. The Court erred in excluding competent and relevant testimony offered on behalf of defendant at the trial.

13. The Court erred in refusing to sustain the defendant's objection to testimony at the opening of the trial because the petition does not state a cause of action.

14. The finding of the Court is erroneous because in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States.

15. The finding of the Court is erroneous because it denies rights of defendant claimed under the Constitution of the State of Missouri, and especially under section 23 of the second article thereof.

16. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the Unnited States, in that it deprives defendant of property without due process of law, contrary to the 14th Amendment to said Constitution.

17. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the State of
52 Missouri, in that it deprives defendant of property without due process of law, contrary to section 30 of the second article of said Constitution.

18. The Court erred in finding for plaintiff and thereby denying to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States.

19. The Court erred in finding for plaintiff because plaintiff has no legal capacity to sue in manner and form as in said petition attempted.

20. The Court erred in finding for plaintiff because there is a defect of parties plaintiff.

21. The Court erred in finding for plaintiff because the finding is excessive.

22. The Court erred in its finding by imposing forfeiture of franchise for which there is no warrant or authority of law.

23. The said finding for plaintiff is erroneous and contrary to law.

24. The said finding is erroneous and beyond the powers of the Court.

25. The Court erred in its finding for plaintiff because said finding imposes upon defendant excessive and unusual punishment in violation of the Constitution of Missouri, and especially of the 25th section of the second article thereof.

26. The Court erred in finding for plaintiff because the relator is not authorized by law to maintain this action on behalf of the State.

27. The Court erred in entering a finding of forfeiture under the pleadings in this action.

And thereafter, on the 1st day of November, 1911, at the same term of court, and within four days after the finding, the defendant filed its motion in arrest, which, omitting caption and signature, is as follows:

Motion in Arrest.

Again comes said defendant, by its attorneys, and moves the Court to arrest the judgment herein, for reasons following, to-wit:

1. The petition is fatally defective for want of a proper party plaintiff.

53 2. The petition is fatally defective in that relator is not warranted or authorized by law to maintain this action on behalf of the State.

3. The finding or verdict is irregular.

4. The finding or verdict is insufficient to support or warrant a judgment of forfeiture.

5. Upon the pleadings no judgment for plaintiff should be entered.

6. The petition does not state facts sufficient to constitute a cause of action.

7. The finding or verdict is not responsive to the issues of the pleading.

8. The finding and verdict of the Court are insufficient to support any judgment because same are in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States.

9. The finding and verdict of the Court are insufficient to support any judgment because same deny rights of defendant claimed under the Constitution of the State of Missouri, and especially under section 23 of the second article thereof.

10. The finding and verdict of the Court are insufficient to support any judgment because same disregard rights of defendant under the Constitution of the United States, in that same deprive

defendant of property without due process of law, contrary to the 14th Amendment of said Constitution.

11. The finding and verdict of the Court are insufficient to support any judgment because same disregard rights of defendant under the Constitution of the State of Missouri, in that same deprive defendant of property without due process of law, contrary to section 30 of the second article of said Constitution.

12. The finding and verdict of the Court are insufficient to support any judgment because same deny to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States.

Which said motions and each of them the Court, on November 13th, 1911, overruled, to which ruling and order of the Court
54 the defendant, by its counsel, then and there duly excepted severally as to each of said motions.

And on November 29th, 1911, defendant deposited $10 docket fee to the Supreme Court, filed its affidavit for appeal, which was allowed to the Supreme Court, and was granted ten days from the end of the October Term to file its appeal bond in the sum of $500 (which was filed and approved on December 9th, 1911), and was granted sixty days in which to file its bill of exceptions, all of which entries, judgments and orders, at and since said judgment were made at the present (October) term, 1911, of said court, and were as follows:

[Said entries here called for and made a part of said bill of exceptions are printed herein at p. 10.]

Inasmuch as the foregoing matters do not appear of record in this cause, and in order that they may be preserved and presented on appeal, the defendant, within the time heretofore allowed it, tenders this, its bill of exceptions in this cause, and prays that the same may be allowed, signed, sealed, filed and made a part of the record herein which is accordingly done on this 28th day of December, 1911, by the undersigned, Judge of said court.

JAMES E. WITHROW, [SEAL.]
Judge Circuit Court, City of St. Louis, Mo., Before Whom said Proceedings Were Had.

December 27, 1911.—Above bill of exceptions examined and approved.

FORREST G. FERRIS.

55 And said bill of exceptions is indorsed as follows: "Filed Dec. 28, 1911. Chas. R. Graves, Circuit Clerk."

Appellant tenders the foregoing Abstract of the Record in lieu of a full transcript, and prays this Honorable Court to accept the same, as provided by the statute and rules of this Honorable Court.

P. H. CULLEN,
THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Attorneys for Appellant.

56 And thereafter, to-wit, on the 11th day of October 1912, the court made and entered of record the following:

In the Supreme Court of Missouri, Division No. 1, October Term, 1912.

STATE ex Rel. SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Now at this day it is ordered by the court that this cause be and the same is hereby transferred to Court in Banc.

And thereafter, to-wit, on the 21st day of September 1912, the said Appellant filed its printed brief containing assignment of errors in words and figures as follows, to-wit:

57 *Appellant's Assignment of Errors.*

Appellant assigns error in the record and proceedings of the said Circuit Court, City of St. Louis, in the following particulars which will be stated as points for reversal, together with the authorities to support same:

Appellant's Points and Authorities.

I.

The trial Court erred in overruling the demurrer because of the defect of parties plaintiff.

The State would be the only authorized plaintiff, yet the petition in no manner alleges that the State brings the suit or is plaintiff.

R. S. 1909, sec. 10322.
Patterson v. Temple, 27 Ark. 202.
U. S. v. Dougherty, 7 Blatchf. 424.

II.

The trial Court erred in not sustaining the demurrer, for defects in not alleging the necessary party plaintiff to be the State, and the body of the petition alone demonstrates the party moving.

State v. Matson, 38 Mo. 489.
Higgins v. R., 36 Mo. 418.
Proctor v. Ry., 42 Mo. Ap. 124.
Headlee v. Cloud, 51 Mo. 301.

III.

The demurrer should have been sustained because of defect of parties plaintiff, in that the action should be "for the use" of the

City of St. Louis, in accord with the Constitution since all such fines and penalties go direct to the school fund. The provision (sec. 10304) in this law for payment into the State Treasury is unconstitutional.

Const., Mo., Art. 11, sec. 8.
In re Stead, 116 Mo. 537.
R. S. 1909, sec. 3030.
State v. Land Co., 97 Mo. Ap. 226.

58 IV.

The trial Court erred in overruling the demurrer because there is no allegation in the petition that defendant ever had any connection with any contract or understanding or other agreement illegal under the law against pools, trusts and monopolies. The omission to file the affidavit of innocence, without such allegations and proof, is no ground to forfeit the charter of defendant.

R. S. 1909, sec. 10304.

While the terms of section 10322 may appear at first glance to warrant forfeiture, they are to be read along with sections 10304 in pari materia, and together the paramount intent is to forfeit for breach of the law. Want of affidavit warrants beginning of suit (if the requirement be valid) but that alone is not sufficient to forfeit the charter.

R. S. 1909, sec. 10298.
Taylor v. Taylor, 10 Minn. 107.
Edelstein v. U. S., 149 Fed. 636.

The entire chapter on pools, trusts and conspiracies should be included and considered in reaching the intent of section 10322, and the literal terms of the latter (or rather its implication) as to forfeiture should be narrowed in order to harmonize with section 10304, which defines the controlling purpose of the whole enactment. That is necessary according to established rules for interpretation of statutes.

State v. Emerson, 39 Mo. 89.
State v. King, 44 Mo. 283.
State v. Diveling, 66 Mo. 375.
State v. Heman, 70 Mo. 441.
Cole v. Skrainka, 105 Mo. 303.
Kane v. Ry., 112 Mo. 34.

59 V.

The trial Court erred in not sustaining the demurrer (on the last ground thereof) because the required statutory affidavit of innocence (recited in the petition) cannot lawfully be demanded of any officer of defendant, in that the statement exacted therein that the company has not, "at any time within one year" from the date of the affidavit, participated in any of the forbidden agreements

is ex post facto and makes the requirement inconsistent with section 10304, as well as unconstitutional and void.

Const. Mo., Art. 2, sec. 15.

State ex Rel. v. Hardware Co., 109 Mo. 118.

VI.

The trial Court erred in not sustaining the demurrer because the petition does not state a cause of action, in that a proceeding by quo warranto, either ancient, original, or by information of that nature is essential to obtain forfeiture of franchise of a business corporation.

R. S. 1909, sec. 2631.

Section 10322 does not conflict with or repeal section 2631, nor authorize any other proceeding than by quo warranto to forfeit such a charter.

VII.

The trial Court erred in not sustaining the demurrer to the petition because the form of the affidavit demanded of innocence by the officers of defendant could only be made in a county, and no authority to alter the form in any respect is given by
60 the law to company officers in St. Louis City. Hence, they could not swear to same in its procrustean form without being penalized under section 10324.

R. S. 1909, sec. 10322.

VIII.

The Court erred in overruling each of the grounds of the demurrer to the petition.

IX.

The Court erred in refusing to give the peremptory instruction for defendant at the trial.

X.

The Court erred in denying to defendant the equal protection of the laws under the Constitution of the United States, 14th Amendment thereof, by entering judgment and forfeiture, and thereby disregarding the rights, privileges and immunities of defendant and of its managing officers under the Constitution and Laws of the United States.

XI.

The Court erred in overruling the motion in arrest of judgment.

XII.

The Court erred in overruling the motion for new trial.

XIII.

The Court erred in refusing the first instruction asked by defendant at the trial.

61 XIV.

The Court erred in refusing the second instruction asked by defendant at the trial.

XV.

The Court erred in refusing the third instruction asked by defendant at the trial.

XVI.

The said Court erred in refusing the fourth instruction asked by defendant at the trial.

XVII.

The said Court erred in refusing the fifth instruction asked by defendant at the trial.

XVIII.

The said Court erred in refusing the sixth instruction asked by defendant at the trial.

XIX.

The Court erred at the close of the entire evidence in refusing to give the instruction requested by defendant for a finding in its favor.

XX.

The trial Court, by refusing the peremptory instruction for defendant, denied to defendant and its officers the equal protection of the laws guaranteed to them by the 14th Amendment to the Federal Constitution, and denied to defendant and its officers their rights and immunities thereby secured, in that it is unreasonable and oppressive to require corporate officers to make such an
62 affidavit of innocence, and yet to leave every "partnership, individual or association of individuals" (also within the law against monopolies, sections 10299, 10303) in the same situation and circumstances immune from such requirement.

R. Co. v. Ellis, 165 U. S. 150.
Paddock v. Ry., 155 Mo. 524.

XXI.

The trial Court erred in not finding for defendant upon the grounds indicated in the foregoing points and assignments.

XXII.

The trial Court erred in not finding for defendant because the requirement of the affidavit of innocence is not validated by the supposed immunity defined in section 10325, because as to the affidavit the immunity is not complete and not commensurate with the constitutional guaranty to the officers of the defendant against the giving of a self-incriminating affidavit.

State ex Rel. v. Hardware Co., 109 Mo. 118.
Counselman v. Hitchcock, 142 U. S. 547.
Followed and approved, Glickstein v. U. S., 222 U. S. 141.
Edelstein v. U. S., 149 Fed. 642.

XXIII.

The constitutional protection extends to such affidavits and other administrative affairs as well as to court proceedings.

State ex Rel. v. Hardware Co., 109 Mo. 118.
In re O'Shea, 166 Fed. 180.
U. S. v. Bell, 80 Fed. 830.
Edelstein v. U. S., 149 Fed. 642.

63 XXIV.

The statutory affidavit of innocence (sec. 10322) includes the year date "19—", and hence cannot apply to defendant which was incorporated in 1882 as this record shows (Abs., p. 29). Nowhere in the statute is a word of authority to any one (not even to the Secretary of State) to reform or revise the form, mutatis mutandis, in any particular. It is strictly procrustean; hence the affidavit could not truthfully be made without change by the officers of defendant, and hence the trial Court should have instructed for defendant.

XXV.

The affidavit prescribed by the statute is not "due process of law" to enforce the antitrust law as it requires oath before a county officer in the City of St. Louis, and makes the ownership of any "trust certificates" unlawful.

64 And thereafter to-wit, on the 5th day of October 1912, the Respondent filed its statement, brief and argument.

And thereafter to-wit, on the 11th day of October 1912, the Appellant filed its reply brief.

And thereafter, to-wit on the 28th day of January 1913, the court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, Court in Banc, October Term, 1912.

STATE ex Rel. SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,

vs.

MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Come now the parties aforesaid, by attorney, and after argument submit their cause to the Court.

65 And thereafter, to-wit on the 28th day of March 1913, the court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, Court in Banc, October Term, 1912.

THE STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court, City of St. Louis, rendered, be in all things affirmed, and stand in full force and effect; and that the said Respondent recover against the said Appellant costs and charges herein expended and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

66 In the Supreme Court of Missouri, October Term, 1912.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, Appellant.

Appeal from Judgment of Forfeiture of Charter.

Statement.

This was a suit instituted in the Circuit Court of the City of St. Louis by the respondent against the appellant to have its charter forfeited for failure to make and file with the Secretary of State an anti-trust affidavit, as required by Sections 10322 and 10323, R. S. 1909, regarding pools, trusts, conspiracies and discriminations.

A trial was had before the Court without the intervention of a jury, which resulted in a decree in favor of the respondent, forfeiting the charter of the appellant as prayed.

In proper time all necessary steps for an appeal were duly taken, and thereafter the cause was appealed to this court.

The petition filed in the cause was as follows:

67 "STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court of the City of St. Louis, October Term, 1910.

THE STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Relator,
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Respondent.

Comes now Seebert G. Jones, Circuit Attorney within and for the City of St. Louis, in the State of Missouri, and states that the respondent is and at all times hereinafter mentioned was, a corporation duly organized, incorporated and existing under and by virtue of the laws of Missouri, located and transacting and conducting business in the City of St. Louis and State of Missouri, and as such corporation respondent is amenable to the provisions of Chapter 98 of the Revised Statutes of Missouri of 1909, entitled 'Pools, trusts, conspiracies and discriminations'.

"Relator states that on or about the first day of July, A. D. 1910, the Secretary of State of the State of Missouri, in obedience to the requirements of Section 10322 of said Revised Statutes, duly addressed and mailed to the President of Mallinckrodt Chemical Works, 3600 North Second street, St. Louis, Missouri, the respondent incorporated company, a letter of inquiry as to whether the said respondent corporation had all or any of its business or interest in or with any trust, combination or association of persons or stockholders,
as named in the provisions of Article 1 of said Chapter 98 of
68 said Revised Statutes, and requiring an answer, under oath,
of the president, secretary or managing officer of said respondent company, and said Secretary of State duly enclosed in said letter of inquiry a form of affidavit, being the same form required by the laws of the State of Missouri and prescribed and set forth in said Section 10322 of said Revised Statutes and being in words and figures as follows, to-wit:

(Here the petition sets forth a full copy of the form of affidavit prescribed in section 10322.)

"And thereupon it became the duty of said respondent corporation to make answer to such inquiry by filing or causing to be filed with the Secretary of State the affidavit prescribed in and required by Sections 10322 and 10323 of said Revised Statutes, but respondent corporation, unmindful of its said duty, in disregard of the statutes and laws of this State in respect to pools, trusts and conspiracies and discriminations and in violation of said sections 10322 and 10323, has failed and refused, and still fails and refuses, to make answer to such inquiry, under oath of its president, secretary, treasurer or managing officer, as required by said sections, and has failed, neglected and refused, and still fails, neglects and refuses to file or cause to be filed with the said Secretary of State such affidavit, described and required by said sections to be made and filed, although more than

thirty days have elapsed since the date of the mailing of such inquiry to respondent corporation by said Secretary of State, as aforesaid.

"And relator further states that the fact of such failure of respondent corporation and its officers to make such answer
69 and file such affidavit in response to said letter of inquiry, within thirty days from the mailing thereof, has been by said Secretary of State duly certified to relator, the said Circuit Attorney of the City of St. Louis.

"Relator states that by reason of the premises respondent has forfeited its charter and subjected itself to the forfeitures and penalties imposed by Sections 10322 and 10327 of said Revised Statutes.

"Wherefore, relator prays that respondent's charter and its certificate of incorporation be declared and adjudged forfeited, void and of no effect, and that the costs of this proceeding be adjudged against respondent.

SEEBERT G. JONES,
Circuit Attorney of the City of St. Louis.
FOREST G. FERRIS,
Assistant Circuit Attorney."

The appellant filed a demurrer to the petition and assigned numerous grounds therefor, which was by the Court overruled; and thereupon the defendant answered, the substance of which is as follows:

1. Plaintiff has no legal capacity to sue in manner and form as in said petition attempted;

2. There is a defect of parties plaintiff;

3. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition;

4. This defendant cites Section 23 of the second Article of the Constitution of the State of Missouri as a bar to the allegations of the petition;

5. Defendant for further defense admits that on the first day of June, 1910, and from that day to the present time defendant was and still is a corporation duly organized and existing accord-
70 ing to law, and that at the said time mentioned defendant was and is doing business and had and has an office in the City of St. Louis, Missouri.

For further answer defendant denies generally each and every allegation of the petition herein, except as above admitted.

By answering over, counsel for appellant waived the demurrer and the attending rulings thereon, which relieves this Court of the duty to review the same.

The facts of the case are few and undisputed.

The evidence showed that on the 13th day of June, 1910, the Secretary of State enclosed in an envelope, properly addressed to the appellant, postage prepaid, the letter and the contents thereof mentioned in the petition, which was duly registered by the postal authorities, and was on the following day, June 14th, 1910, delivered to and received by the appellant. The contents of said letter consisted of a sheet of paper, on the one side of which was printed a

blank form of the affidavit, required by Sections 10322 and 10323, R. S. 1909, to be made by the president, secretary or other managing officer of the appellant company, and by him filed in the office of the Secretary of State, within thirty days from the date of the mailing of said blank by the Secretary of State to the company.

In order to have a clear conception of this case it will be necessary for us to copy some of the most important statutes involved in the case and to state the substance of the provisions, certain others, which are incidentally or collaterally involved.

Sections 10322, 10323, 10324 and 10325 read as follows:

"SEC. 10322. Secretary of State to Make Inquiry.—Form of Affidavit.—It shall be the duty of the Secretary of State,
71 on or about the first day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this State, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of Article I of this chapter, and to require an answer, under oath, of the president, secretary of managing officer of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

Affidavit.

STATE OF MISSOURI,
County of ——, ss:

I, —— ——, do solemnly swear that I am the —— (president, secretary or managing officer) of the corporation known and styled —— ——, duly incorporated under the laws of ——, on the — day of ——, 19—, and now transacting or conducting business in the State of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said —— ——, known and styled as aforesaid, is not now, and has not at any time within one year from the date of this affidavit, created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity,
convenience, repair, any product of mining, or any article
72 or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not entered into or become a member of a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employe, or for the directors or stockholders of

any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination, or combinations, or the manufactured product thereon, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract or agreement with any person, associations of persons or corporations designed to lessen or which tends to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State, or under the terms of which it is proposed, stipulated, provided, agreed or understood that any particular or specified article, product
73 or commodity shall be dealt in, sold or offered for sale in this State to the exclusion, in whole or in part, of any competing article, product or commodity.

(President, secretary or managing officer.)

_____.

Subscribed and sworn to before me, a — within and for the County of ____, this — day of ____, 19—.

[SEAL.]

_____.

"And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath to answer to said inquiry or on failure to do so within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the Prosecuting Attorney of the county or the Circuit Attorney in the City of St. Louis, wherein said corporation is located, and it shall be the duty of such Prosecuting Attorney or Circuit Attorney, at the earliest practicable moment, in the name of the State, and at the relation of said prosecuting or circuit attorney to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this State. Provided, however, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the Court may cause against such corporation, in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in
this State, a fine not to exceed five thousand dollars and
74 not less than one hundred dollars. Provided, however, that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fee of ten dollars, to be paid to the Prosecuting Attorney or the

Circuit Attorney in the City of St. Louis, remit the penalty herein prescribed."

"SEC. 10323. Affidavit, by and before whom made.—The affidavit required by this article shall be made by the president, secretary, treasurer or managing officer of such corporation in this State, and shall be made before some person authorized to administer oaths in this State."

"SEC. 10324. Penalty for false affidavit.—Every person who shall make, or cause to be made, and file or cause to be filed, said affidavit, knowing the facts stated therein to be false, shall, on conviction, be adjudged guilty of perjury, and shall be punished by imprisonment in the penitentiary for a term not exceeding seven years."

"SEC. 10325. Duty of Secretary of State—production of books.—It shall be the duty of the Secretary of State, at any time upon satisfactory evidence that any company or association of persons duly incorporated under the laws of this or any other State, doing business in this State, has entered into any trust, combination or association in violation of the preceding sections of this article, to demand that it shall make the affidavit as above set forth in this article as to the conduct of its business. In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue
75 as is provided in section 10322 of this article. Provided, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article; and, provided, further, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers."

Upon the reverse side of the sheet of paper previously mentioned there was printed a blank form of the inquiry, which Section 3025, R. S. 1909, requires the Secretary of State, on or before June 15th of each year, "to send by mail to every stock company or association, * * * which is organized for the purpose of gain, or to hold property within this State."

Sections 3026 to 3034, both inclusive, provide what shall be stated in reply to said inquiry by said stock companies and associations, and when the same shall be filed with the Secretary of State.

Said sections, in so far as the appellant is concerned, provide, either literally or substantially, as follows:

SECTION 3026. That every incorporated company, * * * organized under the laws of this State whose capital stock is divided into shares, shall annually, on the 1st day of July, report to the
76 Secretary of State the location of its principal business office, the name of its president and secretary, the amount of its capital stock, * * * the par value thereof and its actual value at

the time of making the report, the cash value of all of its real and personal property situated in this State, on the 1st day of June, immediately preceding the date of the report, and the amount of city, county and State taxes, paid by any such company for the year last preceding the report.

Section 3027 relates to foreign corporations doing business in this State; and consequently it is immaterial to the propositions involved in this case.

Section 3028 requires all corporations doing business in this State, both domestic and foreign, to keep their books and accounts in such manner as to enable them accurately and promptly to comply with the requirements of said sections 3025 to 3034, both inclusive; also that no such company shall be exempt from the duty of making such report because perchance it may not have received the blanks, which section 3025 requires the Secretary of State to send to it and all such companies.

Section 3029 prescribes by what officer of the company the report shall be signed and sworn to.

Since several provisions of Section 3030 require consideration at the hands of this Court we will for that reason, and here, copy it in full, which is as follows:

"SEC. 3030. Every incorporation to which sections 3025 to 3034, inclusive, apply, failing, within sixty days from July the 1st in each year, to make the report herein provided for, shall be subject to a fine of not less than fifty nor more than one thousand dollars, for each offense, and each succeeding thirty days of such failure shall constitute a separate offense and be subject to a like fine, which
77 said fines shall be cumulative, and one action may be maintained to recover one or more such fines, to be recovered before any court of competent jurisdiction. No suit shall be maintained for any such offense unless brought within six months from September 1st of the year in which the report is due, which date shall be the time when such right of action accrues; and it is hereby made the duty of the Secretary of State, as soon as practicable after the first day of September in each year, to report to the Prosecuting Attorney of the county in which any such delinquent corporation may be located, the fact of its failure to make the required report, and the Prosecuting Attorney shall, at the first court term after he receives the report from the Secretary of State, institute proceedings in the name of the State, at the relation of the county, to recover the fine or fines herein provided for, which shall be applied to the county revenue fund, except that for instituting and prosecuting said suits the Prosecuting Attorney shall receive as his compensation one-fourth of the penalty collected; and in case any such suit shall be taken to either of the courts of appeals or the Supreme Court, then the Attorney-General is hereby required to assist the Prosecuting Attorney, and the Attorney-General shall also be entitled to one-fourth of the amount recovered from the corporation violating the law. The Secretary of State shall, whenever a corporation makes its report after the time provided by law for the making of such report, certify that fact to the Prosecuting Attorney."

Section 3031 has reference to the dissolution of domestic corporations, and the retirement of foreign corporations from the State. Neither of those provisions are material to this case.

Section 3032 requires the Assessor of each county in the
78 State, and the President of the Board of Assessors of the City of St. Louis, to report to the Secretary of State all corporations, domestic and foreign, doing business therein, etc.

Section 3033 requires the Secretary of State to refer all such reports to the Legislature, etc.

And Section 3034 confers upon the Circuit Attorney of the City of St. Louis the same duties that said sections 3025 to 3033 confer upon the Prosecuting Attorneys of the various counties of the State.

It was also shown that the appellant in due time and in proper form, made out, sworn to and filed with the Secretary of State the report required by said sections 3025 to 3034, which as previously stated, was printed on the reverse side of the sheet of paper upon which was printed the blank affidavit of innocence of all pools, trusts, combinations, conspiracies, etc., required of said companies by said sections 10322 and 10323; also that appellant declined or refused to make, sign, swear to or file with the Secretary of State, said affidavit of innocence, or as it is sometimes termed the "anti-trust affidavit," required by said last two sections to be made, signed and sworn to by the president or other officer of the company mentioned therein.

The evidence also showed that the Secretary of State in compliance with the requirements of said section 10322, notified the Circuit Attorney of the City of St. Louis, that the appellant had not, within thirty days from the date of his mailing said inquiry to it or at any other time, answered the same under oath or otherwise, as was required by said statute 10322.

79 *Opinion.*

I.

Counsel for appellant in this Court, have assigned twenty-five errors; they are, however, apparently abandoned about one-half of them; and we will devote our time to the consideration of the remainder of them.

Attending the first. It is by counsel for appellant that the suit should be dismissed because the petition shows upon its fact a defect of parties plaintiff.

If that were true, then counsel should have demurred to it for that reason. In fact that was one of the grounds stated in the demurrer, as disclosed by the record, which was by the trial court overruled.

If counsel for appellant intended or wished to rely upon that point, they should have declined to plead further and should have stood upon the demurrer, but instead of so doing, they filed an answer to the merits. That action of counsel waived whatever merit there may have been in the question, which cannot be again raised by answer, as was here attempted. This is elementary.

Roberts v. Walker, 82 Mo. 200.

All objections appearing upon the face of the petition are waived by answering, except first, that it does not state facts sufficient to constitute a cause of action, and, second, that the Court has no jurisdiction to try the cause.

Section 1804, R. S. 1909.

Elfrank v. Seiler et al., 54 Mo. 134.

We therefore rule this question against appellant.

80 II.

It is next insisted by counsel that the petition does not state facts sufficient to constitute a cause of action against the appellant, for the reason that the suit is brought in the name of Seebert G. Jones, Circuit Attorney within and for the City of St. Louis, and not in the name of the State of Missouri, which it is claimed is the only party authorized by Section 10322, R. S. 1909, to bring the suit. In other words, they insist that the suit should have been instituted in the name of the State and at the relation of the Circuit Attorney.

By reading said Section 10322, it will be seen that it requires the suit to be brought in the name of the State and at the relation of the Circuit Attorney.

If I correctly understood counsel they do not differ as to what the law is governing this question, but they differ as to the facts. Counsel for appellant insists that the suit is brought in the name of Jones as Circuit Attorney and counsel for respondent contend that the record shows that it was brought in the name of the State, and at the relation of the Prosecuting Attorney, as required by said statute.

In stating the case, we copied the petition in full, including caption. The latter reads as follows: "The State of Missouri, at the Relation of Seebert G. Jones, Circuit Attorney of St. Louis, Relator, vs. Mallinckrodt Chemical Works, a Corporation, Respondent."

The petition proper begins by stating: "Comes now Seebert G. Jones, Circuit Attorney within and for the City of St. Louis in the State of Missouri, and states that the respondent is," etc.

Counsel for appellant insists that the caption of the petition constitutes no part thereof; and that the character of the suit must be determined from the allegations contained in the body
81 thereof, which determines the parties thereto.

In support of this insistence we are cited to the following cases:

State et al. Tapley v. Matson, 38 Mo. 489; Higgins v. Railroad Co., 36 Mo. 418; Proctor v. Railway Co., 42 Mo. App. 124; Headlee v. Cloud, 51 Mo. 301.

The first case mentioned was a suit instituted in the name of the State to the use of the administrator de bonis non of the estate of Joseph Tapley, deceased, against the securities on the bond of the former administrator.

In the caption of the petition the plaintiff was designated as the administrator de bonis non of the estate of Tapley, deceased, but no allegation of that character was stated in the body of the petition.

In other words, the petition failed to state that Tapley had departed this life intestate; that an administrator of his estate had been duly appointed, qualified and took charge of his estate; that said administratorship had ceased and that plaintiff had been appointed administrator de bonis non as his successor in office.

The insufficiency of the petition was for the first time raised in this court; and after considering the question, the Court held that the petition was bad and that because the error appeared upon the face of the record the judgment of the Circuit Court should be reversed.

In the case of Higgins v. Railway Co., supra, the suit was instituted by an infant through its guardians, to recover the statutory penalty of $5,000, for the negligent killing of her father. The caption of the petition was stated in the following language: "Hatty Higgins, infant, by Eliza Higgins, her guardian, plaintiff
82 vs. Hannibal and St. Joseph Railroad Company, defendant," but no allegation of that character was stated in the body of the petition.

On appeal this Court held the petition insufficient for the failure to state in the body of the petition that the plaintiff was the duly appointed, qualified and acting guardian of the infant plaintiff..

In Headlee, Admr., v. Cloud, supra, the plaintiff in the caption of the petition described himself as the public administrator, but failed to state in the body thereof that he was the duly elected, qualified and acting administrator of the estate of the deceased, etc.

The defendants demurred to the petition, which was by the Circuit Court sustained; and upon appeal this court held the petition was insufficient and affirmed the judgment.

In the case of Proctor v. Railway Co. supra, the railroad was in the hands of the defendants, receivers. In both the caption and the body of the petition, it was stated that they were receivers thereof; that they had been duly appointed as such by Judge Brewer, and that they were in charge of, and were operating the railroad at the times complained of, etc. Service was had upon the station agent, and the receivers moved to dismiss for the reason that service was not had upon them personally.

While this case has no special bearing upon the case at bar, yet it recognizes the doctrine announced by this Court in the cases previously cited and considered; and if we are to be controlled by the rule therein announced, then the judgment of forfeiture rendered by the Circuit Court against the appellant will have to be reversed for they are directly in point.

While I have not found any case overruling the cases
83 mentioned in terms, yet the later reports are full of cases holding to the contrary. The later cases hold that even though it be conceded that a suit was brought in the name of the wrong party, nevertheless, the defendant would be in no position to question that error in this court, for the reason it was apparent upon the face of the petition, and it should have been raised by demurrer, and having failed to so do, the error was waived by answering to the merits.

This question was before this Court in the case of State ex rel. v. Fidelity and Guaranty Co., 236 Mo. 352, l. c. 365, where many of the authorities are reviewed, and the contrary rule announced.

The same rule is announced by this Court in the case of Ashton v. Penfield, 233 Mo. 391, l. c. 417.

These cases are in harmony with Section 1794, R. S. 1909.

The petitions in the case of State ex inf. v. Evans, 166 Mo. l. c. 349, and State ex inf. v. Tobacco Co., 177 Mo., l. c. 6, are substantially the same in form as this one.

We are, therefore, of the opinion that the earlier cases cited are erroneous, and should be overruled; also that this insistence of counsel for appellant is not well founded.

III.

It is next contended that the petition is defective because the suit should have — brought "for the use of the City of St. Louis, in accord with the Constitution (Section 8, Article XI thereof) since all such fine and penalties go direct to the school fund. The provision (Section 10304) in this law for payment into the State Treasury is unconstitutional."

84 This contention is untenable for two reasons; first, because this error, if error it is, was waived by answering to the merits; and what has been stated in paragraph two of the opinion regarding a kindred question is equally applicable and controlling here; and, second, even though it be conceded that the provision of section 10304, which directs all fines and penalties collected under and in pursuance to Chapter 98 of R. S. 1909, shall be paid into the State Treasury, is unconstitutional, null and void, and that it should be paid to City of St. Louis, for the use of the school fund, as provided by said Section 8 of the Constitution, still it would not necessarily follow therefrom that this suit should abate or be dismissed for that reason.

That provision of the section might well be declared unconstitutional, and in no manner would it affect or nullify the remaining provisions thereof, or any other section of that chapter.

But independent of that, whatever disposition will be made of the fines and penalties, that may be collected from appellant, is a matter for future consideration by those who may make claim to them.

However, in passing, it may not be out of place to state that this Court has in a number of cases of this character ordered fines of this character paid into the State Treasury, and has thereby recognized the constitutionality of said section of the statute.

IV.

The fourth assignment of error is stated in this language:

"The trial Court erred in overruling the demurrer because there is no allegation in the petition that defendant ever had any con-

85 nection with any contract or understanding or other agreement illegal under the law against pools, trusts and monopolies. The omission to file the affidavit of innocence, without

such allegations and proof, is no ground to forfeit the charter of defendant.

R. S., Sec. 10304.

"While the terms of section 10322 may appear at first glance to warrant forfeiture, they are to be read along with sections 10304 in pari materia, and together the paramount intent is to forfeit for breach of law. Want of affidavit warrants beginning of suit (if the requirement be valid), but that alone is not sufficient to forfeit the charter."

There is no question but what counsel for appellant are correct in the contention that all statutes standing in pari materia should be read and construed together in order to get at the full and clear design of the Legislature. We have so held in numerous cases, and especially in the following.

State ex rel. v. Patterson, 207 Mo. 129, l. c. 144;
State ex inf. v. Standard Oil Co., 218 Mo. 1, l. c. 354 to 357.

With that rule of statutory construction in mind we have carefully considered all of Chapter 98 of Revised Statutes of 1909, consisting of five articles; and after doing so we are fully satisfied that article three thereof, the one governing this case, is complete within itself, in so far as this case is concerned, and that it was the design of the Legislature, as there expressed, to discourage the formation of pools, trusts and combines; also to compel them to disclose the existence of all such pools, trusts and combines, if such existed, the knowledge of which would lie peculiarly within the minds of the officers
86 thereof mentioned in the statute, by requiring such companies to make and file the affidavits, and the imposition of the penalties and forfeitures therein mentioned, which are independent of the sworn reports, penalties and forfeitures mentioned in the first article of this chapter.

The penalties and forfeitures mentioned in the first article have reference to those which are imposed for the actual formation of pools, trusts, conspiracies and combinations, in restraint of trade, etc., while those mentioned in article three refer to those imposed for failure to file the affidavit, and are enforceable even though the company may never have entered into any such pool, trust, conspiracy or combination mentioned in the first article.

If the contention of counsel for appellant is correct, namely, that article three imposes no penalties, then there would be no penalty enforceable against a company for failure to make and file the affidavit required thereby, for the reason that the penalties and forfeitures prescribed by article one, in so many terms, are imposed for the unlawful formations of pools, trusts, etc., and for failure to make and file the report required thereby with the Secretary of State.

This article, like all other statutes, in order to make it effectual, the Legislature prescribed by sections 10322 and 10327 contain penalties which should be adjudged against any such company for its failure to make and file the affidavit required.

The penalties and forfeitures prescribed by section 10322 consist of "a forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this State." And by section 10327, it is provided, "In all suits instituted under this article to forfeit the charter of corporations, or to forfeit the right of a
87 corporation to do business in this State where a judgment of forfeiture is obtained" * * * the Court shall allow the Circuit Attorney * * * a fee of not less than $25 nor more than $500.

From the foregoing observations it is perfectly clear, as previously stated, that this article is complete within itself; that is, it imposes certain duties named therein, upon all domestic and foreign corporations doing business in this State, and prescribes the manner in which those duties must be discharged, the mode of prosecution in case they fail to do so, and the punishment to be inflicted in case they are convicted of such failure.

We have also considered said section 10304, cited by counsel, which is one of the sections of the statute composing Article I of said Chapter 98.

That chapter is entitled "Pools, Trusts, Conspiracies and Discriminations," and said article is entitled "Definitions, Procedure and Penalties."

Sections 10298 to 10301, both inclusive thereof, clearly define each and all of said terms.

Section 10302 makes it a felony for any person to violate any of the provisions of those sections. Section 10303 designates the courts in which the prosecutions shall be brought and by what officers they shall be instituted, etc., and section 10304 prescribes the fines and forfeitures which shall be imposed against all domestic and foreign corporations doing business in this State, for having violated the provisions of any of the sections of that article.

From this, it is also seen that this article is complete in itself and resort to other provisions of the statutes is not necessary for a successful prosecution and punishment of any such company which
88 may be adjudged guilty of violating any of the provisions of said article.

From this consideration of articles one and three, of said chapter 98, it is obvious that each is complete in itself and independent of each other as to penalties and forfeitures, and consequently said Section 10323 of Article III is not modified or controlled by Section 10304 of Article I as insisted by counsel for appellant.

Moreover, by reading the two sections it will be seen that the punishment prescribed by each widely differ, and neither is made to depend upon the other, nor is it provided that the one shall be added to or subtracted from the other. But as previously stated, each is separate punishments imposed for separate offenses.

We, therefore, decide this question against the appellant.

V.

It is insisted that said section 10322 requiring the appellant to file with the Secretary of State the anti-trust affidavit mentioned in the

petition is an ex post facto law, and violative of Section 15 of Article II of the Constitution of this State.

Counsel have not indicated in what manner this section of the statute violates said section of the Constitution, and I have been unable to detect any conflict between them.

The record shows that the appellant was organized and had existed under the laws of this State for many years prior to the date it was required to make the affidavit in question, and file it with the Secretary of State, and upon investigation I find that said section 10322 was enacted in the year 1907, some three years prior to the
89 date when the appellant was required to make and file said affidavit; and by reading said section 10322, it will be seen that it only required the affidavit to state that the company had not at any time within one year from the date thereof (which, if filed, should have been dated about August 1st, 1910) participated in any of the forbidden matters stated in said article three.

From this it appears that the said statute was in force for some two or three years prior to the period of one year which the affidavit would have covered, had it been made and filed as required by law.

An "ex post facto law" is "one which makes an action done before the passage of the law, criminal, which was innocent when committed and which punishes the individual who committed it; or which aggravates a crime and makes it greater than it was when committed; or which changes the punishment and inflicts greater punishment than the law annexed to the crime when committed."

Calder v. Bull, 3 Dallas 386 (U. S.).

Ex parte Bethurum, 66 Mo. 545, l. c. 548.

If we test this statute by this definition of an ex post facto law, it will be seen that it does no violence to said section of the Constitution, for it neither makes an act done prior to its passage criminal, which was innocent when committed, nor does it aggravate a crime or make it greater than it was when committed, nor does it change the punishment or inflict greater punishment than the law annexed to the crime at the time it was committed. I say this for the reason that the wrong complained of in the petition was the failure of appellant to state under oath, as required by said section 10322, that it had not done any of the things therein prohibited, and de-
90 clared to be unlawful within one year immediately preceding the date of the affidavit required thereby to be filed, which would have been for the year beginning on or about August 1st, 1909, and ending on or about August 1st, 1910, the first day of which was about two years prior to the passage of the statute in question, and therefore two years prior to the date of the wrong complained of in the petition.

We are, therefore, of the opinion that section 10322 in no manner violates said section 15 of the Constitution.

VI.

Counsel next insist that the petition does not state a cause of action against the appellant for the reason that it is neither a proceeding

by quo warranto, ancient or original, or by information in the nature of quo warranto, which it is claimed was essential to obtain a forfeiture of the franchise of a corporation organized under the laws of this State.

There would have been much force in this insistence had the Legislature simply declared the matters complained of to be unlawful, without prescribing the remedy therefor, for in that case there would have been no remedy known to our law by which that result could have been obtained, except by quo warranto or by an information in the nature thereof; but the Legislature did not stop at the point suggested. It proceeded further and prescribed in detail the remedy, even the courts in which such prosecutions should be brought, the officers by whom they should be instituted, the name of the plaintiff and at whose relation they should be instituted, the acts which should constitute the offense, as well as the kind of
91 judgment that should be rendered, and the fines and forfeitures that should be imposed upon the offending parties. Also what steps the guilty company might take if it saw proper to take any, after the institution of the prosecution, and before final judgment was rendered to appease the law and be restored to its former legal status.

Under these ample provisions of the statute it was wholly unnecessary for the Circuit Attorney to have resorted to a writ of quo warranto, or to an information in the nature thereof. The majesty of the law could have been and was as completely vindicated under the provisions of this article as if resort had been had to quo warranto or to an information in the nature thereof.

This insistence is without merit and is ruled against appellant.

VII.

Counsel also insist that the petition does not state a cause of action against the appellant, for the reason that it was a physical impossibility for it to have made the affidavit mentioned therein.

This insistence is predicated upon the further contention that according to the provisions of said section 10322, the affidavit "could only be made in a county, and no authority to alter the form in any respect is given by the law to company officers in St. Louis City.

This insistence is untenable, for the reason that paragraph nineteen of Section 8057, R. S. 1909, provides that where the word 'county' is used in any law general in character to the whole State, the same shall be construed to include the City of St. Louis, unless such construction be inconsistent with the evident in-
92 tent of such law, or of some law specially applicable to such city."

The application of this statute to the question in hand can in no manner be considered as being inconsistent with the meaning of and the object to be accomplished by article three of chapter 98 of the statutes, nor with any law which is specially applicable to the City of St. Louis.

This Court has recognized and given force to this rule of con-

struction in so many cases that it can no longer be considered an open question.

VIII.

Counsel for appellant challenges the constitutionality of said section 10322. The contention being, that it violates the XIV Amendment of the Constitution of the United States, in that it denies to the appellant and its officers the equal protection of the laws by requiring them to make the affidavit mentioned therein, and at the same time exempting therefrom all "partnerships, individuals or association of individuals who may be engaged in the same character of business."

This precise question was presented and ruled on adversely to the contention of appellant in the case of State ex inf. Standard Oil Co., 218 Mo. 1. On page 368 we said:

"Their position is that those sections are in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.

93 "In one sense that may be true, but it is not true in a legal sense.

"A corporation is a legal fiction—a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the State, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises. That the State has the power to enforce this agreement, or law of forfeiture, is not questioned by respondents, but they insist that it is a different and greater punishment than is imposed upon an individual for the commission of the same offense. In answer to that, it may be said that an individual is a natural person, created by his Maker, and not by law, and, therefore, has no franchise to exercise or to forfeit, consequently the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

While it is true, to forfeit the charter of a corporation for usurpation of power is equivalent to taking its life, as it were; but we suppose it will not be seriously argued that, because the statute does not demand the life of the individual, as it does of the corporation, as a punishment for his violation of the law, the law should and must be declared unconstitutional and void upon that ground. And, upon the other hand, where a statute denounces certain acts, whether committed by individuals or corporations, or both, it should not be declared unconstitutional because it provides for imprisonment of the former and a fine or forfeiture of the latter's charter, as punishments for their violation of the statute. But if the contention of counsel for respondents is sound, then any individual

94 could form an unlawful combination in restraint of trade with any corporation, and when proceeded against for such

unlawful conduct either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same, but different. And we might add that, if their position is tenable, then the Legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit, ergo, there is no punishment the Legislature could provide, excepting a fine against each. Such a contention regarding the proposition here involved if followed to its logical conclusion would lead to an absurdity, and, at the same time, shows the unsoundness of respondents' contention."

And in passing we might state that experience has taught the courts, both State and Federal, that fines alone are ineffectual to destroy pools, trusts, conspiracies and combinations in restraint of trade, in limiting production and in fixing and maintaining prices. In order to accomplish that end, the strong arm of the criminal law will have to be resorted to and the guilty be incarcerated.

That case was carried to the Supreme Court of the United States and was by that court affirmed.

Those cases, as previously stated, decide this question against appellant's contention here, and we see no reason for changing our views of the law regarding the same.

95 IX.

Counsel for appellant also contend that said section 10322 is unconstitutional, null and void, for the reason that it violates that section of the Constitution which provides that "no person shall be compelled to testify against himself in a criminal case."

Their position is stated in this language:

"The trial court erred in not finding for defendant because the requirement of the affidavit of innocence is not validated by the supposed immunity defined in section 10325, because as to the affidavit the immunity is not complete and not commensurate with the constitutional guaranty to the officers of the defendant against the giving of a self-incriminating affidavit."

State ex rel. v. Hardware Co., 109 Mo. 118; Counselman v. Hitchcock, 142 U. S. 547, followed and approved Glickstein v. U. S., 222 U. S. 141; Edelstein v. U. S., 149 Fed. 642.

We have carefully considered these cases and are of the opinion that they are not controlling in this case.

In the first case cited there was no statute of immunity whatever exempting the officer of the corporation from prosecution for any crime the affidavit might disclose he was guilty of.

In that case this Court very properly held that the section requiring the affidavit to be made, and prescribing a punishment for a failure to do so, was violative of that provision of the Constitution which provides that no person shall be compelled to testify against himself. It was in consequence of that decision that
96 the Legislature enacted section 10325, which provides that "no person shall be subject to any criminal prosecution on

account of any matter or thing truthfully disclosed by the affidavit" mentioned in section 10322.

We held in the Standard Oil case, supra, that the immunity statute there under consideration was valid and sufficiently broad and comprehensive to exempt from prosecution the parties therein mentioned from all crimes they may have disclosed by the proceedings had in that case.

In discussing that question the Court used this language:

"Section 8869, Revised Statutes 1899, granted immunity to all the witnesses who were produced by respondents and who testified in compliance with the order of the Court. No witness can avail himself of Section 23 of Article 2 of the Constitution of 1875, nor of the Fifth Amendment of the Constitution of the United States, as to giving oral testimony, because said statute grants him immunity from prosecution; nor can he set those constitutional provisions up against an order for the production of books and papers, as the same statute would equally grant him immunity in respect to matters provided thereby (Hale v. Henkel, 201 U. S., l. c. 69 to 73).

"Nor was it intended by Section 11 of Article I of the Constitution, nor the Fourth Amendment of the Constitution of the United States, known as the search-and-seizure clause, to interfere with the power of courts to compel the production upon trial of documentary evidence under a subpoena duces tecum (Hale v. Henkel, supra, l. c. 75).

"While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers.

"There is a distinction between an individual and a corporation; the latter, being a creature of the State, has no constitutional right to refuse to produce its books and papers in court for examination in the trial of a proceeding by the State against it; nor can the officer in charge of the corporation charged with a violation of the statutes plead the criminality of the corporation as a refusal to produce the books (Hale v. Henkel, supra, pp. 74 to 76). The rule above announced has the sanction of the highest court in the land and was applied in a criminal prosecution, and a fortiori should the same rule apply to a civil proceeding like the one at bar."

If we correctly understand counsel they do not challenge the validity of section 10325, but insist that its provisions are not so broad as is the constitutional guaranty against self-incrimination, or to exempt the officer of appellant from prosecution for every crime the affidavit in question might disclose he might be guilty of.

In our opinion this insistence is not well founded.

The material part of that section is as follows:

"SECTION 10325. * * * In case of a failure of compliance on the part of the corporation, then the same procedure shall move as is provided in section 10322 of this article. Provided, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required

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by this article; and provided, further, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall he be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers."

The first proviso of this section, namely, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article, is the immunity that is granted to the officer of the corporation making it and which, of course, presupposes that he had thereby disclosed some matter or thing that he and the company had previously done in violation of said chapter 98, commonly known as the "anti-trust laws" of the State; while the second refers to the immunity that is granted to any and all officers, agents employés and others who may be witnesses in any proceeding which might be brought against any such "corporation to forfeit its charter or certificate of incorporation or its right or privilege to do business in this State", for any reason known to said laws.

If we bear in mind the different crimes to which these two immunities refer, much light will be cast upon the apparent confusion that seems to exist in the minds of the learned counsel for appellant. Their position is thus stated: "The immunity extended to a witness in testifying or producing books or papers, in a prosecution or proceeding to enforce the provisions of this article, 99 applies anything which might tend to incriminate him or subject him to a penalty or forfeiture; whereas, in the first proviso (allowing to disclosures by such an affidavit of information as is our immediate concern at present) the immunity extends only to any criminal prosecution and does not even preclude the use of such affidavit in a proceeding to recover a penalty or forfeiture, as in the second proviso ordained." In other words, their contention is, that the words "criminal prosecution," as used in the statute, has a much more restricted meaning than the words "criminal case" or "criminal cause" of the Constitution.

The inference drawn therefrom is, that the affidavit required by section 10822 might disclose some possible crime which the immunity granted by section 10820 would not cover, and suppose, for instance, that the affidavit might disclose some crime which might not be covered by the immunity granted under the first proviso which extends only to "criminal prosecutions," which would not preclude its use in a proceeding to recover a "penalty or forfeiture" mentioned in the second.

This position is untenable, for the reason previously stated, that the first proviso grants immunity from prosecution for all matters and things which might be "disclosed by the affidavit required (to be made) by this article," and if we turn to section 10822, the one

tion requiring the affidavit to be made, it will be seen that it prescribes what the affidavit shall contain, namely, all the matters and things which "article I of this chapter" prohibits corporations and certain others from doing and which by turning to sections 20302 and 30304, it will be seen penalties and forfeitures are in-
100 cluded therein, and being so included by express words, the affidavit therefore could not (if otherwise competent, which I seriously doubt) be used either under the first or second proviso, so says the statute and so say we.

X.

The last insistence presented by counsel and supported by argument is that the finding of the trial court should have been for the appellant for the reason that the Secretary of State did not serve upon it two separate and distinct blank affidavits or reports, the one required by section 3025 to 3034, both inclusive, and the other by section 10322, all R. S. 1909.

The record shows that both of said blanks were printed upon one piece or sheet of paper; one of which was printed upon one side thereof and the other upon the other side.

Section 3025 required the Secretary of State to send the one mentioned therein, on or before June 15th of each year; and section 10322 required him to send the one therein mentioned on or about July 1st of each year.

The record shows that said sheet of paper, with those blank affidavits or reports so printed thereon, was by the Secretary of State sent to the appellant by registered letter on June 13th, 1910, and that it was by the latter received on June 14th, the following day.

The law required the appellant to execute and return this annual report to the Secretary of State within sixty days from July 1st of each year, and the anti-trust affidavit within thirty days from the date the Secretary of State mailed the blank to it.

101 The record also shows that the appellant, by its properly constituted officer, duly executed the former and returned the same to the Secretary of State on the 22nd day of July, 1910, with the blank affidavit printed on the reverse side thereof, as previously stated, unexecuted.

Upon the receipt of said paper the Secretary of State filed said corporation report on said 22nd day of July, and noted said facts upon the records kept in his office for that purpose; and thereupon, the same day, the Secretary of State remailed said paper, with the said executed report on the one side and the blank anti-trust affidavit on the other, back to the appellant for execution. Said paper was placed in an envelope, properly addressed to appellant, postage prepaid and deposited in the United States post office at Jefferson City, Missouri.

Appellant declined to execute this affidavit as required by said section 10322, and assigned as a reason therefor, that it did not believe that it was obliged to so do.

In our opinion there is no merit in this contention.

The blanks were in proper form and were sent to appellant in

due time, and were by it accepted the next day, which gave it ample time to execute and return them to the Secretary of State, as provided for by said statutes.

Appellant knowingly and intentionally refused to make the anti-trust affidavit, and its secretary, Mr. Oscar L. Biebinger, testified that the reason for not making it was, that "I did not believe we were obliged to answer it."

Appellant having knowingly elected to violate the law, there remains nothing to be done except to enforce the penalties and
102 forfeitures prescribed by the statute for such conduct.

XI.

If I correctly understand counsel for appellant, they requested, in oral argument of the cause in this court, that in case we should hold that the company was guilty of the charges made in the petition, that this Court now permit it to make the affidavit required of it by section 10322, upon such terms as we might deem just and proper under the circumstances. But counsel have made no such request in their brief or printed argument, nor have we been cited to any statute or other law which authorizes any such procedure.

After some investigation we find that section 10322 prohibits any such procedure. That section of the statute, after providing "for the forfeiture of its charter or certificate of incorporation, or its right of privilege to do business in this State," contains this provision:

"Provided, however, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the Court may assess against such corporation in lieu of a judgment forfeiting its charter or certificate of incorporation, or its privilege to do business in this State, a fine not to exceed five thousand dollars and not less than one hundred dollars: Provided, however, that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit herein prescribed, the trial court may, in its discretion, and for good cause shown, upon the payment of all costs, together with the attorneys fees of ten dollars, to be paid to
103 the Prosecuting Attorney or Circuit Attorney in the City of St. Louis, remit the penalty herein prescribed."

The only leniency this statute extends to a corporation which has violated the provisions thereof, is irrevocably withdrawn after the final judgment of forfeiture has been rendered by the trial court. This is in keeping with the strenuous legislation that has been enacted by the Legislature of this and practically of all the other states of the Union; also by the Congress of the United States.

They seem to be determined to put an end to all pools, trusts, conspiracies and combinations in restraint of trade, limiting production and in fixing and maintaining prices.

While some of those provisions seem to be rather severe, yet they have not, so far, been sufficient to break up those combinations; and when one of them knowingly and intentionally refused to obey the

law of its creation, I am not prepared, under present conditions, to say that it is entitled to much consideration.

Finding no error in the record, the judgment of the Circuit Court is affirmed. All concur except Bond, J., who dissents in separate opinion.

A. M. WOODSON, *Judge.*

Dissenting Opinion.

I am constrained to dissent to the opinion of the majority of the Court in this case. As I understand the opinion it concedes that unless certain cases cited therein are overruled, the petition in this case states no cause of action; and, hence, would not warrant the judgment of the trial court. I doubt the wisdom of repudiating these rulings. If the theory can obtain, after a full consideration
104 of all the applicatory statutes, that the simple omission to file a prescribed affidavit is sufficient ground for forfeiting the charter of the defendant, then this Court, under its statutory power (R. S. 1909, Sec. 2083) to render such judgment as ought to have been rendered in the trial court should permit the appellant, as requested on page 18, et seq., of its reply brief, to comply with the formality of filing the affidavit under the authority of Section 10322 of the Revised Statutes.

There is not the faintest suggestion in this record that the charter or business of the defendant corporation exists or is conducted in violation of the anti-trust law of this State. Nor is there any proof, even arising to the dignity of an inference, to be found in the record which discloses that the failure of the officer of the defendant company to make the affidavit prescribed was caused by any other motive than a declination to answer inquiries which his learned counsel (as stated on the argument) advised him were inquisitorial and unconstitutional.

Under these circumstances I think the case should be reversed and remanded to the Circuit Court with directions to permit the filing of the affidavit and to enter judgment in the matter according to the provisions of Section 10322, R. S. 1909.

HENRY W. BOND, *Judge.*

105 And thereafter, to-wit, on the 8th day of April 1913, the court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, Court in Banc, April Term, 1913.

STATE OF MISSOURI, at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,

vs.

MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Comes now said Appellant by attorney and files its motion for a rehearing herein.

Which said motion is in words and figures as follows, to-wit:

106 In the Supreme Court of Missouri, October Term, 1912.

No. 16,967.

STATE OF MISSOURI, at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, Appellant.

Appeal from Judgment of Forfeiture of Charter.

Appellant's Motion for Rehearing.

Now comes the appellant by its attorneys and moves the Court to grant a re-hearing in this cause in order to permit a reconsideration thereof, for the reasons following:

1. The Court has inadvertently overlooked some decisive points of error, duly assigned by appellant;

2. There is no discussion in the learned opinion of the Court of our claim of error that an action for a penalty must strictly follow the law as to its requirements (1st Brief, p. 33) and hence should not be governed by the liberality of pleading extended to
107 ordinary civil suits; as to which we would cite further

State v. Railroad, 83 Mo. 144
Barker v. Phelps, 39 App. 288
Wood v. Tel. Co., 59 App. 240
Dunkin v. Ins. Co., 63 App. 260

The effect of those decisions is to require a proper party plaintiff in penal actions. The difference between an ordinary action and one to forfeit a charter (which is highly penal in character, though in form civil) in that particular, is noteworthy. This action is a special statutory proceeding, of a penal nature, to deprive defendant of valuable property in its franchise as a corporation. In such a case, the difference from an ordinary suit is marked and vital. Even if objection for want of a proper party plaintiff had not been made below, at all, it would be available here, according to high authority; but in this case, it was expressly made by demurrer (Abs., p. 6), and when overruled, was again expressly made by answer (Abs., p. 6).

On this point an able Court has said:

"Where the parties omitted are mere formal parties, and not indispensable to a decision of the case upon its merits, it will be too late to make objection at the hearing; but where the rights of the parties not before the Court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, the objection may be taken at the hearing, or on appeal, or on error."

Gerard v. Bates, 124 Ill. 150 (7 Am. St. 351)

Another western Court has said:

"It is said by counsel for the appellants that the question
108 of the right of Thomas to institute and maintain this proceeding in his own name was not raised in any manner in the Court below. Assuming this to be correct, we do not think it any reason why the Supreme Court should be precluded from considering it. This court, in ordinary actions at law and in equity, will, on its own motion, look into the record of a case brought here on appeal or error, for the purpose of determining whether the petition upon which the action is founded states a cause of action, and whether the Court has jurisdiction of the subject-matter of the suit; and **in a special proceeding founded solely upon a statute of the state,** it is not only a privilege, but it is the duty, of this Court, on its own motion, to look into the record, and determine whether the proceeding is authorized by such statute, and **whether the party prosecuting the proceeding is thereby authorized by the statute.**"

(Display type is ours.)

Thomas v. Franklin, 60 N. W. 568 (42 Neb. 310).

Defendant at each and every possible stage in the court below objected to the form of the action in that particular (permitting thereby amendment if desired). We respectfully submit that its objection should be reconsidered in the light of the admitted fact that the action is penal in nature, and is required to be brought by a petition "in the name of the state" (Sec. 10,322). That the petition, in its body, does not purport to speak for the State as required by the statute is a blemish which we hope will be reconsidered; so that, if defendant's objection be sustained, there may be opportunity given to defendants to plead further, after the petition has been amended.

The Missouri decisions, cited in the learned opinion of
109 the Court and overruled in the argument therein, are supported by other authority which asserts that the caption of a pleading should not be considered to supply any omissions in the body thereof. That rule seems sound, and of general acceptance. We respectfully submit that the overruling thereof is worthy of a reconsideration, as an important general rule in the law of pleading.

A standard authority on pleading announces the rule thus:

"Notwithstanding the plaintiff describes himself in the title as executor, as trustee, etc., yet the body of the pleading must show that he sues in his representative capacity, and if in this the title is defective, the defect may be cured by proper averments."

Bliss, Code Pleading (3d ed.) Sec. 264, p. 397

Another Missouri commentator and Judge declares:

"In a suit brought by a public administrator, the body of the petition should show his authority to bring the action. Matters set forth in the caption will not obviate defects in that regard. The caption is simply descriptio personæ, and forms no part of the statement required in the petition."

1 McQuillins, Plead. & Pr., sec. 299, p. 282

See also State v. Dehlinger, 46 Mo. 107

Besides decisions already cited we add:

"In the caption of the petition, the plaintiff describes himself 'as public administrator', having charge of the partnership estate of John H. Caynor & Co., but it nowhere appears in the petition, by any allegation, that he was public administrator of Greene
110 County. The caption is simply a descriptio personæ and not a substantive allegation. The petition by proper averments ought to show the authority of the plaintiff to bring such a suit."

Headlee v. Cloud, 51 Mo. 301.

See also

Wolff v. Ward, 104 Mo. 157
State v. Bartlett, 68 Mo. 583
Rhodes v. McNulty, 52 Mo. App. 306

That rule of pleading is not peculiar to Missouri, but appears to be elsewhere accepted.

See group of decisions cited in

31 Cyc. 99

See also

Bennett v. Whitney, 94 N. Y. 302
Rich v. Soules, 64 Vt. 408

This suit is one in which the right of action is vested in the State and the suit must be "in the name of the State" (sec. 10322). Defendant objected to the form of the petition in this respect by demurrer and later by answer.

We earnestly ask that the ruling as to waiver, on these facts, be reconsidered, as it seems to us contrary to the spirit and intent of the Code to consider a waiver to arise from mere fruitless objections, overruled.

Williamson v. Ins. Co., 141 Fed. 54

The principles involved in other rulings in this State appear out of harmony therewith, as we respectfully submit.

Tobin v. Ry., 18 S. W. 996
Barker v. Ry., 126 Mo. 143

111 3. The result of the judgment of affirmance deprives appellant of the equal protection of the laws, and hence is an infringement of its rights secured by the 14th Amendment to the Federal Constitution.

Persons who are officers of corporations are alone required to make exculpatory affidavits under sec. 10322, whereas partnerships, individuals and other associations, besides corporations, are (by other parts of the law as to Pools and Monopolies) within the same inhibition as corporations (Sec. 10303).

No reasonable ground that we discern exists for discriminating between persons who are officers of a corporation and those who fall within the terms of sec. 10303 and who are not such officers.

Of course, corporations may be subjected (by the State of their creation) to valid conditions and terms as part of the law of their being; but here the requirement bears on the persons who are its officers. Why they are selected and not those other persons who are doing business as described in secs. 10298, 10303 is, we submit respectfully, an infringement of the immunities of those here in question, in view of the federal decisions.

Gulf Ry. v. Ellis, 165 U. S. 150
Ry. Co. v. Taylor, 198 Fed. 159
Paddock v. Ry., 155 Mo. 537

In the last cited case, the distinction we invoke is clearly stated and applied.

Corporations are within the 14th Amendment of the Federal Constitution, so that, subject to a legitimate exercise of the police power, no state can deny them the equal protection of the laws.

112 A state statute undertaking to regulate the business of a railroad company, which fixes penalties for disobedience of its provisions so excessive as to effectually prevent the company from resorting to the courts to test its validity, is unconstitutional as depriving the company of the equal protection of the laws.

Wilmington City Ry. Co. v. Taylor, 198 F. 159.

So we respectfully claim is the requirement as to "trust certificates," touching which we shall present here a separate assignment.

4. The Court inadvertently omitted to notice the assignment of error by appellant in which it is claimed that the affidavit required by the statute is not "due process of law" because it demands a sworn statement that the defendant "does not own any trust certificates."

"Trust certificates" may be entirely innocent, while the form of affidavit required does not limit that averment to the scope of the provisions of the statute against "pools and trusts" (Appellant's First Brief, p. 37).

This is a feature of the affidavit which has inadvertently received no treatment in the discussion by the Court, but it has always seemed to us an important feature of the affidavit, and one which makes it an unlawful requirement. Ry. v. Taylor, 198 Fed. 159. "Trust certificates" are documents which may be entirely innocent and many companies own trust certificates of various kinds, wherein and whereby syndicates or other associations certify the interests held by the various parties concerned therein.

To require a company (or its officers) to make affidavit that it does "not own any trust certificates" is, we most respectfully

113 submit, a feature of the requirement which the affidavit makes which might well engage the attention of the Court as a part of those features of the affidavit which appellant claims are improper and illegal requirements, and therefore not "due process of law," within the meaning of the Federal and the State constitutions.

It has always appeared to us that if the affidavit made a require-

ment which implied no invasion of the law of the subject, but which could not be made by company officers carrying on ordinary and legitimate business, the requirement would be held invalid, as not "due process of law," following the precepts announced in many Federal decisions which bear upon the interpretation of the organic law of our nation.

5. There was an inadvertent oversight, or perhaps we were not clear in stating our proposition that the presence of "19—" in the affidavit (sec. 10322) implied that a company like defendant (incorporated in 1882) is not included in the purview of the law (Abs., p. 29) as it appears affirmatively that defendant was incorporated prior to "19—."

There is also another suggestion we respectfully submit.

The petition of the plaintiff and the letter of the Secretary of State (Abs., p. 26) do not permit or sanction any change by affiant in the form in the official blank, or in the statute or in the petition.

The records of the honored Secretary (Abs., p. 26) show incorporation of defendant in 1882; the affidavit requires an oath that it was in "19—."

The phase of change which is treated in the learned opinion of the Court is as to the "County," as including the "City" of
114 St. Louis, but that is a minor feature as compared with the date of incorporation, and with the affidavit of non-ownership of any "trust certificates."

Those phases of the affidavit we hope to be allowed to discuss further upon a re-argument if the same be accorded. If a change or changes in the form as prescribed by the statute and as recited in the petition are permissible, to what extent may they go, and in what law is the authority for those proposed changes to be found?

Furthermore, would not such a theory be a departure from the theory of the case for plaintiff as stated in the petition, which recites the "19—" and the "County" as well, without intimating that any changes in the form in those particulars would be accepted or approved.

These are points concerning which we pray a rehearing and an opportunity for a fuller discussion, in view of the far-reaching consequences of the decision.

Defendant has heretofore relied on the rulings announced through a series of years in the Circuit Court in St. Louis supporting the contentions we have made herein, and the result reached in this Court is therefore a very unwelcome surprise. Some aspects of the case are new, and we should be grateful for an opportunity to ask the Court to revise several of its rulings and especially the intimations (near the close of the learned opinion) if they intend to imply that defendant has been within the ban of the statute generally.

We would ask what evidence or even allegation is there, to that effect.

One of our chief objections to the procedure is that no such affi-
davit is lawful to require, under our organic laws, in the ab-
115 sence of a charge that defendant has been party to any forbidden agreement, pool or monopoly. Here there is no such

charge, and we hope the Court does not intend, by any language in the opinion, to imply any such state of facts, neither alleged nor proved. We do not believe the Court so intends, and we believe that a rehearing would make the matter of the whole case clearer, while no injustice could possibly be done by granting that privilege.

Conclusion.

In the time at command, during the short interval of ten days allowed for this motion, we have been able to supply but a meager outline of the points on which we pray a rehearing.

The case is a serious one, and its effects upon defendant we do not intend to enlarge upon at this time. No charge has been made, at any time, that defendant has been guilty of making any agreement to secure a monopoly or to infringe in any other way the chapter of our laws under which this action was begun.

It was advised that under the Simmons decision no affidavit could lawfully be exacted. Since the Butler case in Illinois was decided (in 201 Ill.) our old statute, then identical with sec. 8974 (R. S. Mo., 1899) has been amended by the new matter printed with the new section in Missouri (sec. 10325, R. S., 1909); but in Illinois the act requiring the affidavit has been amended in most important respects which the Court should examine.

Laws Ill. 1907, p. 216.
Hurd's Ill. Stats. (1909), ch. 38, p. 269.

That amendment in Illinois conforms to some of our contentions on this appeal. In every view of the case, we submit that a
116 rehearing would diminish the possibility of injustice inadvertently being done, and would permit further consideration of some phases of the case in the light of additional authorities to be submitted.

We dislike to impose any undue burdens upon the Court, but we believe that this case because of its novel features would well be worthy of the further review for which we pray.

SCHNURMACHER & RASSIEUR.
BARCLAY, FAUNTLEROY, CULLEN & ORTHWEIN.
Attorneys for Appellant.

117 And thereafter, to-wit, on the 28th day of April, 1913, the Court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, Court in Banc, April Term, 1913.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent.
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Now at this day the Court having considered and fully understood the motion heretofore filed by the Appellant for a rehearing

herein, doth order that said motion be, and the same is hereby overruled.

118 And thereafter, to-wit on the 29th day of April 1913, the Court made and entered of record the following, to-wit.

In the Supreme Court of Missouri, Court in Banc, April Term, 1913.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent.
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Comes now the said Appellant by attorney and files its motion for a stay of the Mandate herein.

Which said motion is in words and figures as follows, to-wit:

119 In the Supreme Court of Missouri, April Term, 1913.

No. 16967.

STATE ex Rel. SEEBERT G. JONES, Circuit Attorney, Respondent,
v.
MALLINCKRODT CHEMICAL WORKS, Appellant.

Action for Forfeiture of Charter.

Motion for Short Stay of Mandate to Permit Steps for Further Review.

Again comes defendant, by its attorneys, and moves this Honorable Court to stay the mandate of affirmance herein, (or, if same has been issued, to recall said mandate) for such reasonable time as the Court may order, to the end that appellant may meantime have opportunity to take the usual and appropriate steps to obtain a writ of error for a review of the judgment and proceedings herein by the Supreme Court of the United States; which steps appellants expects and intend to take promptly as practicable, and for which purpose the aforesaid indulgence is respectfully prayed.

The appellant would humbly submit that thirty days (or approximately that time) would be sufficient for said purpose, and therefore that period of stay is respectfully suggested for the consideration of the Court upon this motion.

SCHNURMACHER & RASSIEUR,
BARCLAY, FAUNTLEROY, CULLEN & ORTHWEIN,
Attorneys for Appellant.

120 And thereafter, to-wit, on the 10th day of May 1913, the Court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, April Term, 1913, Court in Banc.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,

vs.

MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Now at this day, it is ordered by the Court that the motion heretofore filed by the Appellant for a stay of the Mandate herein, be passed for service.

In the Supreme Court of Missouri, April Term, 1913, Court in Banc.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,

vs.

MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

And thereafter, to-wit, on the 13th day of May, 1913, the appellant filed herein assignment of errors (which appear in full herein at page 122 hereof).

121 And thereafter, to-wit, on the 13th day of May 1913, the Court made and entered of record the following, to-wit:

In the Supreme Court of Missouri, Court in Banc, April Term, 1913.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,

vs.

MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Now at this day there is presented to the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in chambers, a petition for a Writ of Error to the Supreme Court of the United States, a Writ of Error to the Supreme Court of the United States, a Citation directed to the said Respondent citing and admoni-hing him to appear in the Supreme Court of the United States on the 12th day of June 1913; an assignment of errors, a bond in the sum of Five Thousand Dollars ($5,000), which said Writ of Error is allowed, said Citation signed and issued, said assignment of errors filed, said Bond approved, ordered filed and made a part of the record herein.

Which said assignment of errors is in words and figures follows, to-wit:

122 In the Supreme Court of Missouri, April Term, 1913.

No. 16965.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, Appellant.

Assignment of Error by Appellant (Plaintiff in Error).

Now again comes appellant (plaintiff in error) by its attorneys in the above entitled cause of State ex rel. v. Mallinckrodt Chemical Works, and assigns error in the record and proceedings of the Supreme Court of the State of Missouri, in the following particulars, towit:

1st Assignment of Error.

The said Supreme Court of Missouri erred in affirming the judgment of the Circuit Court, City of St. Louis, in that said affirmance denies to said appellant (plaintiff in error) rights, privileges and immunities claimed by it under the Constitution of the United States;

2nd Assignment of Error.

The said Supreme Court erred in not reversing the judgment of the Circuit Court, City of St. Louis, in said cause, thereby denying to said appellant (plaintiff in error) rights, privileges and immunities claimed by it under the Constitution of the United States;

3rd Assignment of Error.

The said Supreme Court erred in denying appellant (plaintiff in error) the equal protection of the laws under the Constitution of the United States (14th Amendment thereto) by entering judgment of forfeiture and thereby disregarding the rights, privileges and immunities of appellant (plaintiff in error) and of each of its managing officers, under the Constitution of the United States (14th Amendment thereto);

123 4th Assignment of Error.

The said Supreme Court erred in affirming the judgment of the Circuit Court, City of St. Louis, in said cause, which refused a peremptory instruction for defendant and thereby denied to said defendant (appellant and plaintiff in error) and to its officers the equal protection of the laws guaranteed to them by the 14th Amendment to the Constitution of the United States, in that it is unreasonable and oppressive to require corporate officers to make such affidavit and yet to leave every "partnership, individual or association of individuals" (also within the Missouri law against monopolies, secs. 10299, 10303) in the same situation and circumstances, im-

same from such requirement; and in affirming judgment of the said Circuit Court to that effect, said Supreme Court denied to appellant (plaintiff in error) rights, privileges and immunities claimed by it under the Constitution of the United States, (14th Amendment thereto).

5th Assignment of Error.

The said Supreme Court of Missouri erred in affirming the judgment of the said Circuit Court, City of St. Louis, because the affidavit prescribed by the statute of Missouri mentioned in the petition in this case is not "due process of law" to enforce the local law, because the same discriminates against defendant as a business corporation in favor of partnerships, individuals or association of individuals who are not required to make such affidavit; and thereby "due process of law" and rights, privileges and immunities of appellant (plaintiff in error) are denied to it by said affirmance of judgment contrary to the Constitution of the United States (14th Amendment thereto), as well as to such of its managing officers.

6th Assignment of Error.

The said Circuit Court, City of St. Louis, erred in entering judgment of forfeiture against relator under sec. 9002 (R. S. Mo., 1909) which statute violates rights and privileges of appellant (plaintiff in error) to the equal protection of the laws, under the 14th Amendment to the Constitution of the United States;
124 and the Supreme Court likewise erred in affirming said circuit judgment, and thereby producing the same result.

Wherefore said appellant (plaintiff in error) by its attorneys, prays that for such of said errors assigned, and for any other plain and manifest error to its prejudice herein, said judgment of said Supreme Court of Missouri and of said Circuit Court below be reversed, and such further orders be made herein as may be just.

BARCLAY, FAUNTLEROY, CULLEN & CRITTENDEN,
Attorneys and of Counsel for said Plaintiff in Error (Appellant).

125 Which said petition for Writ of Error is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1911.

No. 19865.

STATE OF MISSOURI at the Relation of SYDNEY G. ROSEN, Attorney of the City of St. Louis, Respondent,

v.

MISSOURI-EDISON COMPANY et al., Appellants.

Petition for Writ of Error.

To the Honorable the Judges of the Supreme Court of the United States, or to any of the Associate Judges thereof, or to the Chief Justice of the Supreme Court of Missouri:

Comes now the above named appellant, Bellefontaine Chemical Works (plaintiff in error) by its attorneys and complains that in the record of proceedings in the above entitled cause (No. 19,865) in the Supreme Court of Missouri and also in the rendition of the judgment in the above entitled cause in the Circuit Court, City of St. Louis, as shown by the record in said cause, manifest error to [illegible] to the great damage of said plaintiff in error (appellant) by said Supreme Court of Missouri and that error in the judgment of said and both of said courts comes to the denial of rights and immunities specially set up and claimed by said plaintiff (appellant) under the constitution and laws of the United States, as shown by record thereto and by the assignments of error hereinafter filed in said cause by said plaintiff in error (appellant) and that the said Supreme Court of Missouri in whose record and judgment the aforesaid errors appear is the highest Court of law or equity in the said State of Missouri in which a decision could be had in said action between said parties aforesaid.

Wherefore said plaintiff by its attorneys prays for the allowance of a writ of error from the Supreme Court of the United States to said Supreme Court of Missouri for the cure of citation thereon, and for an order fixing the amount of bond for damages and costs (for stay of execution) in said cause, and for such other order and proceedings as may cause the manifest error herein to be corrected by the Supreme Court of the United States.

Dated this 13th day of May, 1911.

[illegible]

Attorneys for said Plaintiff in Error,
Bellefontaine Chemical Works.

The foregoing petition for Writ of Error in the above entitled cause is allowed by the undersigned, as Chief Justice of the Supreme Court of Missouri, this 13th day of May, 1911.

[illegible]

Chief Justice of the Supreme Court of Missouri.

Attest: the seal of said Court:

[illegible]

Clerk of the Supreme Court of Missouri.

[illegible]

127 Which said order of allowance of the Writ of Error by the Hon. Chief Justice of the Supreme Court of the State of Missouri is in words and figures as follows, to wit;

In the Supreme Court of Missouri, April Term, 1913.

No. 16965.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
v.
MALLINCKRODT CHEMICAL WORKS, Appellant.

Now at this day there is presented to the undersigned, Chief Justice of the Supreme Court of Missouri, a petition of appellant (plaintiff in error) for allowance of a Writ of Error from the Supreme Court of the United States to said Supreme Court of Missouri, in the above entitled cause, a Writ of Error accordingly, and a citation directed to said defendant in error (all upon assignments of error heretofore duly filed in this Court) and having duly considered the same, it is now ordered that said petition for and said Writ of Error be allowed, and the amount of bond thereon for damages and costs (to stay execution therein) be fixed at the sum of five thousand dollars and the same is now presented by counsel for plaintiff in error and the sureties and form whereof approved by the undersigned, and said citation is thereupon signed.

Done and ordered entered of record, at Jefferson City, Missouri, this 13th day of May, 1913.

HENRY LAMM,
Chief Justice of the Supreme Court of Missouri.

128 And which said recognizance bond is in words and figures as follows, to-wit;

Know all men by these presents, That we, Mallinckrodt Chemical Works, a corporation, as principal, and Shepard Barclay as sureties are held and firmly bound unto the State of Missouri at the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis in the full and just sum of five thousand ($5,000.00) dollars to be paid to said obligee and to its successors, legal representatives and assigns; to which payment well and truly to be made, we bind ourselves, our successors, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 13th day of May in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at the October Term, A. D. 1912 of the Supreme Court of Missouri, in a suit depending in said Court between said State of Missouri at the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis as plaintiff and said Mallinckrodt Chemical Works as defendant judgment was rendered against the said Mallinckrodt Chemical Works, of affirmance of a judgment by

the Circuit Court, City of St. Louis of forfeiture of charter and for costs, and the said Mallinckrodt Chemical Works, (appellant) has obtained a writ of error to the said Court to reverse the said judgment in the aforesaid suit, and prayed a citation directed to the said State of Missouri at the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis, as defendant in error, citing and admonishing said defendant in error to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, That if the said Mallinckrodt Chemical Works, plaintiff in error, shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its said plea, then the above obligation to be void, else to remain in full force and virtue.

MALLINCKRODT CHEMICAL WORKS,
By EDWARD MALLINCKRODT, [SEAL.]
Its President.

[SEAL.] SHEPARD BARCLAY, [SEAL.]
By O. L. BIRVINGER,
Its Secretary.

Witnesses:
——— ———.
——— ———.

Attest its Corporate Seal:
——— ———.

Approved.
JNO. T. BARKER,
Att'y General.

Approved May 13th, 1913.
HENRY LAMM, *C. J.*

129 And thereafter, to wit, on the 14th day of May, 1913, the Court made and entered of record the following, to wit:

In the Supreme Court of Missouri, Court in Banc, April Term, 1913.

STATE OF MISSOURI at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis, Respondent,
vs.
MALLINCKRODT CHEMICAL WORKS, a Corporation, Appellant.

Comes now the said appellant, by attorney and files its præcipe, pursuant to Rule Eight of the Supreme Court of the United States.

130 Which said Præcipe is in words and figures as follows, to-wit;

In the Supreme Court of the United States.

MALLINCKRODT CHEMICAL WORKS, Plaintiff in Error,
vs.
STATE OF MISSOURI ex rel SEEBERT G. JONES, Circuit Attorney, Defendant in Error.

On Error to Supreme Court of Missouri.

Præcipe for Transcript on Writ of Error.

To the Honorable Jacob D. Allen, Clerk of the Supreme Court of Missouri:

Pursuant to Rule 8 of the Supreme Court of the United States, the undersigned, attorneys for plaintiff in error, hereby respectfully designated and indicate the following as the portions of the record in the Supreme Court of Missouri to be incorporated into the transcript of the record on writ of error therein from the Supreme Court of the United States, allowed May 13, 1913, by Hon. Henry Lamm, Chief Justice of the Supreme Court of Missouri, in the above entitled cause in that Court (No. 16,967) wherein the said plaintiff in error was and is appellant and the said defendant in error was and is respondent in said Supreme Court of Missouri, and accordingly we request you to include same in said transcript, to-wit:

1. As Return to said writ of error, please insert.

(*a*) Original writ of error with allowance of same by Chief Justice Lamm;

(*b*) Citation and acceptance of service thereon;

(*c*) Clerk's return to said Writ of Error, the said return to include the following;

2. The venue and usual introduction (referring to date of filing thereof in your court) and full certified copy of order of appeal, judgment, short record of circuit court and certificate and date of filing in this Court;

3. Appellant's Printed abstract of Record and date of filing, and entries of briefs and submission; and copy of Assignments of error as filed in appellant's brief, with date of filing thereof;

4. Entry of date, Judgment and opinion of Supreme Court and copy of opinion;

5. Entries of motion for rehearing and ruling thereon,

6. Assignments of error filed;

7. Copy of petition for writ of error and allowance;

8. Bond filed and approved;

131 9. Order of Chief Justice of allowance approved, etc., May 13, 1913.

10. Any other entries to complete appellate record on writ of error;

11. Usual entries connecting the aforesaid to show sequence.

12. Copy of this præcipe and service thereon.

13. Certificate of clerk as to record (as directed by præcipe) and that Hon. Henry Lamm is Chief Justice of said Court.

14. Transcript to be promptly finished so as to be filed by or before June 12, 1913.

Respectfully submitted,

BARCLAY, FAUNTLEROY, CULLEN & ORTHWEIN,

Attorneys for Plaintiff in Error.

The undersigned as counsel for defendant in error hereby acknowledge service of copy of above Præcipe to Clerk of Missouri Supreme Court on Writ of Error from the Supreme Court of the United States to the Supreme Court of Missouri (in case No. 16,967 in latter Court). This 14 day of May, 1913

JOHN T. BARKER,

Of Counsel for Defendant in Error.

[Endorsed:] Mallinckrodt Chem. Works vs. State ex rel. Præcipe on writ of error. Filed May 14, 1913, J. D. Allen, clerk.

132 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the Honorable Henry Lamm, whose name appears signed to the original writ of error and citation, and to the other original papers herein referred to (copies of which are hereto attached) was at the time of signing the same and is now the Chief Justice of the Supreme Court of the State of Missouri; that his said signature to the papers above indicated is genuine and that full faith and credit should be given the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson this 19th day of May, 1913.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of the State of Missouri.

133 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, by virtue of the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing pages, numbered One to One hundred and thirty-three inclusive contain a full, true and correct transcript of the record and proceedings in the case of the State of Missouri at the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis, Respondent versus Mallinckrodt Chemical Works, a corporation, Appellant, as directed by the præcipe filed and made a part hereof, and as the same appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri hereto, at my office in the City of Jefferson on this the 19th day of May, 1913.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN.
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 23,728. Missouri Supreme Court. Term No. 580. Mallinckrodt Chemical Works, plaintiff in error, vs. The State of Missouri at the relation of Seebert G. Jones, Circuit Attorney of the City of St. Louis. Filed June 2d, 1913. File No. 23,728.

Office Supreme Court, U. S.
FILED
JAN 27 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. ~~500~~ 187

MALLINCKRODT CHEMICAL WORKS
Plaintiff in Error
vs.
THE STATE OF MISSOURI, at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis

State's Action to Forfeit Charter

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR PLAINTIFF IN ERROR

S. MAYNER WALLACE
WM. R. ORTHWEIN
SHEPARD BARCLAY
Attorneys and of Counsel for Plaintiff in Error

(23,728)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 580

MALLINCKRODT CHEMICAL WORKS
Plaintiff in Error

vs.

THE STATE OF MISSOURI, at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis

State's Action to Forfeit Charter

STATEMENT OF THE CASE

for

PLAINTIFF IN ERROR

Short Outline: This is a statutory action by the State of Missouri, at the relation of the Circuit Attorney of the City of St. Louis, against the Mallinckrodt Chemical Works (a Missouri corporation) to forfeit the charter of the defendant for failure of its officers to file an affidavit of innocence, required by a State law to suppress Pools and Conspiracies in restraint of trade.

The Circuit (trial) court rendered a judgment of forfeiture, and the Supreme Court affirmed that result.

Defendant has brought the case here by writ of error, upon several federal grounds, assigned below, unsuccessfully, in many forms.

The Missouri law, requiring of the individuals who happen to be the managing officers of the defendant corporation an affidavit of innocence, is claimed to infringe the rights and immunities of plaintiff in error and of those individuals who are its officers (and have a property right in its franchises) under the 14th Amendment to the federal Constitution:

> 1. By denying to defendant and to the managing officers the equal protection of the laws.
>
> 2. By depriving defendant and its officers of its franchise (property) without "due process of law".

The foundations of these contentions may well be shortly stated, at the outset, to be kept in mind as the facts of the record are developed.

A

The affidavit of innocence (required by the Missouri statutes) from officers of corporations only (and not from individuals or partnerships, which are likewise within the scope and penalties of the Missouri law against pools and conspiracies in restraint of trade) makes several drastic demands, which are not "due process of law", and which deny to defendant and to each of its officers the equal protection of the laws, viz:

(1) The affidavit requires each

> "that he" (the [illegible]) "has not [illegible] and does not and will not [illegible]"

> without giving any definition thereof, or distinguishing between "good" and "bad" which might be evidence of some connection with the subject of pools, etc., and those having no relation to any such [illegible] or understanding forbidden by the

have against each or complaints in account of funds, and without giving to the terms of the affidavit any information, light or adding as to what sort of "[true certificate]" are within the meaning of the affidavit).

(3) The affidavit requires an impossibility, by demanding the use of an unchangeable term, in stating an oath that the date of incorporation of defendant is to "[be...]", when this record shows affirmatively that plaintiff is over one [illegible] noted in 1882 (Rec., p. 5), and that said fact was well known to the State officers and is (and for years have) a matter of record in the office of the Honorable Secretary of State (Rec., pp. 5-6).

(4) The affidavit requires another impossibility, in the use of an unchangeable term, including some and [illegible] to a "[count]", while Sec. [illegible] (b) is not part of any count in Missouri, by virtue of the terms of the constitution of Missouri and of its laws, and defendant is therefore in Sec. [illegible] (b), where it is "[located]", an allegation in the petition (Rec., p. 5).

These features of [illegible] in the [illegible] is provided (as construed by the Supreme Court of Missouri) and that it impossible of observance by plaintiff in error and its managing officers, and furnish an "[excuse] of conduct" possible for plaintiff in error to have or to obey.

5

The law of Missouri concerning Trade and Trade [illegible] [illegible] any person [illegible] any pool, trust, agreement or understanding with any

person in restraint of trade (in various forms described) and gives large powers to the courts "to prevent and restrain any person or persons, corporation, partnership, individual or association of individuals from entering into any combinations, pools", etc. (sec. 10,303, R. S. Mo.). Severe penalties are thereby imposed; and the word "person" (as used in the Act) is thus defined:

> "Sec. 10309. **'Person' or 'persons' defined.** —The words person or persons, used in this article, shall be deemed to include natural persons, partnerships, associations of persons and corporations created or organized by or under the laws of this state, or under the laws of any other state or country (Laws, 1913, p. 554."

But the only "persons" embraced within the terms of the statute requiring an affidavit of innocence (under penalty of loss of property in its franchise) are the individuals who chance to be managing officers of corporations; as to other "natural persons, partnerships and associations of persons" (other than officers of corporations) no affidavit of innocence is required by the law. That is a discrimination without any reasonable ground not merely against the corporation (which cannot, as such, make an affidavit) but against the persons, the individual citizens, who are in charge of the company management and is not "equal protection" of the laws.

There is no suggestion in the Missouri statute of any ground or reason for so discriminating against the officers of corporations, or against even the artificial persons called corporations themselves, in respect of this requirement of an affidavit, whereby the presump-

tion of innocence and burden of proof of guilt are shifted (as to those persons) and a forfeiture of property in the franchise is based thereon, when no such result or rule of law is applied to individuals or to other persons who are equally within the incidence of the same laws against pools and conspiracies in restraint of trade.

We mention those features of the proceeding now, as preliminary to our

Full Statement of the Case

The only charge against plaintiff in error by the

PETITION

filed by the Circuit Attorney (Rec., p. 6) is that defendant "failed and refused" to file the required affidavit with the Secretary of State. It is set forth in full in the petition (Rec., p. 7). We quote some parts here:

Affidavit

"State of Missouri,)
County of.....,) ss:

I, ..., do solemnly swear that I am the ..... (president, secretary or managing officer) of the corporation known and styled ..... duly incorporated under the laws of ..... on the ..... day of ....., 19..., and now transacting or conducting business in the State of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit. And I do further swear that the said..... known and styled as aforesaid, is not now, and has not at any time within one year from the date of this affi-

davit, created, entered into, become a member of, or participated in any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property," etc., * * * "and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employe, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination, or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article;" etc. * * *

.....

(President, secretary or managing officer.)

Subscribed and sworn to before me, a ..... within and for the County of ....., this ..... day of ....., 19...

(Seal) .....

There is no charge in the petition that plaintiff in error was ever in any pool, monopoly or combination of any sort in restraint of trade.

Omission to file the statutory affidavit is the sole ground on which the forfeiture of the charter of plaintiff in error was demanded by the State (and ultimately adjudged).

After service of process the defendant below filed (in 1910) a

Demurrer

which (Rec., p. 9) among other grounds, besides the assignment that the petition "does not state facts sufficient to constitute a cause of action", added the following:

> "5. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition."

The defendant's demurrer was overruled (Dec. 27, 1910) and thereafter defendant filed an

Answer

which, in addition to a statutory general denial (and other defenses) set up the following special one (Rec., p. 9):

> "4. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition."

Trial

At the trial which ensued there was some controversy arising from the facts that the proposed (blank) affidavit of innocence demanded of defendant was sent to defendant as printed on the back of a blank for the

annual report (which latter is also required of defendant under the Missouri law) and not in any other form. The paper was duly completed by defendant, and upon it the said annual report of defendant was duly made, verified and returned to the Secretary of State, but the blank (on the reverse side) intended to carry the affidavit of innocence for 1910 was not filled out, or verified, by defendant when the paper was returned to the Honorable Secretary of State (Rec., pp. 14-30) by defendant.

Part of the testimony for the State included an official letter by the Honorable Secretary of State to relator (the Circuit Attorney of St. Louis) wherein appears a statement showing that plaintiff in error was incorporated in the year 1882 (Rec., p. 25), viz:

"Corporation No.	Name of Corporation	Date of Incorporation	Location of Principal Office
1913 1-2	Mallinckrodt Chemical Works	Apr. 18, 1882	St. Louis"

The form of affidavit of innocence demanded of defendant by the State appears not only in the petition (Rec., p. 7) and in the statute (R. S. Mo., Sec 10322) but also in the learned opinion of the Supreme Court of Missouri in this cause, as printed in this record (p. 44) as well as in the published report of the decision below (249 Mo. 714).

Declarations of Law

Defendant, at the close of the testimony, requested a binding declaration (Rec., p. 31) that under the pleadings and evidence the finding should be for defendant; but that declaration was refused, and exception was duly saved by defendant at the time.

Defendant also prayed of the Court the following further declaration which was refused, and exception was duly saved by defendant at the time to that ruling, viz (Rec., p. 31):

II

"The Court declares the law to be that under the 14th Amendment of the United States Constitution, 'No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws', and that the rights of defendant under that amendment are infringed and invaded by this action in so far as the same may be intended to punish, or to impose any forfeiture on, defendant for failure to make such affidavit as is mentioned in section 10322 (Mo. R. S. 1909)."

Judgment of Forfeiture

The Circuit Court (Rec., p. 10) thereupon (Oct. 30, 1911) entered a judgment of forfeiture of the Charter of defendant, the vital parts of which judgment are as follows (Rec., p. 10):

"wherefore, it is ordered and adjudged by the Court that the corporate charter of the respondent, the Mallinckrodt Chemical Works, and its certificate of incorporation, and its right and franchise to do business in this State, be and the same are hereby declared forfeited, void and of no effect; that the respondent pay the costs of this proceeding and that execution issue therefor. It is further ordered by the Court that a copy of this judgment be certified to the Secretary of State of the State of Missouri. Instructions filed."

Thereafter, in due season at the same term (Oct. 31, 1911) defendant filed a

Motion for New Trial

In that motion (*inter alia*) the refusal to give the second request (above quoted) was assigned as error, as well as the refusal of the binding instruction for defendant (Rec., pp. 32-33) and the following:

> "14. The finding of the Court is erroneous because in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."
>
> "16. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the United States, in that it deprives defendant of property without due process of law, contrary to the 14th Amendment to said Constitution."
>
> "18. The Court erred in finding for plaintiff and thereby denying to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States."

Defendant's motion for new trial was overruled (Rec., p. 35) Nov. 13, 1911, as was also defendant's

Motion in Arrest

which had been seasonably filed (Rec., p. 34) on the usual grounds of insufficiency of the petition to state a cause of action, and on the following specific federal grounds (Rec., pp. 34-35), viz:

> "10. The finding and verdict of the Court are insufficient to support any judgment be-

cause same disregard rights of defendant under the Constitution of the United States, in that same deprive defendant of property without due process of law, contrary to the 14th Amendment of said Constitution."

"12. The finding and verdict of the Court are insufficient to support any judgment because same deny to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States."

The rulings denying those several motions were duly excepted to by defendant, at the time (Rec., p. 35) and a bill of exceptions preserving of record the aforesaid proceedings was duly allowed, signed, sealed and made part of the record by the learned trial Judge (Rec., p. 35) in season.

Appeal

The cause was then taken by defendant by appeal to the Supreme Court of Missouri, upon the statutory affidavit and other proper steps (Rec., pp. 11-13) for *supersedeas;* and in the Missouri Supreme Court the points of federal organic law (already mentioned and discussed later) were specifically assigned as errors in the proceedings under review (Rec., pp. 36-40).

The Forfeiture Affirmed

The Supreme Court of Missouri *affirmed* the judgment of forfeiture of the Charter of defendant (Rec., p. 41) and the learned opinion of that Court is in this Record (pp. 48-62) as well as in the official reports (249 Mo. 714).

A **Motion for Rehearing** by defendant (Rec., pp. 63-68) was duly filed, which presented (among other grounds) the federal points already assigned in various forms and repeated their substance forcibly (Rec., pp. 65-67) but that motion was overruled, and then defendant, in due course, sued out the pending (Rec., p. 1)

Writ of Error

after appropriate and required preliminaries (Rec., pp. 73-75) including assignments of error (Rec., pp. 71-72) presenting again the federal points already touched upon, which will be specified later in this Brief, in full detail.

The record below was duly returned into this Court and has been printed, and the plaintiff in error prays a reversal of the judgment of forfeiture and such further relief as may be appropriate.

SPECIFICATIONS OF ERROR

The plaintiff in error, by its attorneys, assigns and specifies error in the record and proceedings of the Supreme Court of Missouri herein, in these particulars:

I

The said Supreme Court of Missouri erred in affirming the judgment of the Circuit Court, City of St. Louis, in that said affirmance denies to plaintiff in error rights, privileges and immunities claimed by it under the Constitution of the United States;

(*a*) Under the 14th federal Amendment, said judgment denies defendant "due process of law" because the statute of Missouri (sec. 10,322, R. S. Mo., 1909, as construed and applied by said Supreme Court of Missouri) and the proceedings herein thereunder, are not "due process of law", in requiring an oath of defendant's officer that defendant "has not issued and does not own any trust certificates", without explanation or other indication of the meaning of that requirement.

II

(*b*) Under the 14th federal Amendment, said judgment below denies defendant "due process of law" because the Missouri statute (sec. 10,322, R. S. Mo., 1909, as construed and applied by the State Supreme Court) and the proceedings thereunder are not "due process" in re-

quiring the impossibility of an unchangeable affidavit of incorporation of defendant in "19...", when the record shows defendant was incorporated in 1882 (Rec., p. 25) so that such affidavit could not be truthfully made by defendant's officers as demanded by the State, upon condition of forfeiture of defendant's Charter.

III

(*c*) Under the 14th federal Amendment said judgment below denies defendant "due process of law", because the local statute (R. S., Mo., 1909, sec. 10,322) as applied by the State Supreme Court, and the proceedings thereunder are not "due process" in requiring an unchangeable affidavit in a "County", when defendant's domocile and chief office are not within a "County", so that neither venue nor jurat of the affidavit could be true where defendant was required to verify the same.

IV

(*d*) Under the 14th federal Amendment said judgment below denies defendant "the equal protection of the laws" by demanding of the officers of the defendant corporation such an affidavit of innocence while other persons (individuals, partnerships and other associations) who are equally within the terms of the state provisions against such pools and con-

spiracies (R. S. Mo., 1909, secs. 10,299, 10,303) are not required to make such affidavits, and hence the presumption as to innocence and burden of proof as to guilt are thereby shifted as to the persons who are corporate officers only, and denying them thereby the equal protection of the laws of the State, and of the protection of the federal Constitution in that particular.

V

The said Supreme Court erred in not reversing the judgment of the Circuit Court, City of St. Louis, in said cause, thereby denying to said plaintiff in error the aforesaid rights, privileges and immunities claimed by it in the trial court and in said Supreme Court under the Constitution of the United States;

VI

The said Supreme Court erred in denying to plaintiff in error and its officers the equal protection of the laws under the Constitution of the United States (14th Amendment thereto) by entering judgment of forfeiture and thereby disregarding the aforesaid rights, privileges and immunities of plaintiff in error and of each of its managing officers, claimed by them in the trial court and in said Supreme Court, under the Constitution of the United states (14th Amendment thereto);

VII

The said Supreme Court erred in affirming the judgment of the Circuit Court, City of St. Louis, in said cause, which refused a peremptory instruction for defendant and thereby denied to said defendant (plaintiff in error) and to its said officers due process of law and the equal protection of the laws guaranteed to them by the 14th Amendment to the Constitution of the United States, in that it was unreasonable and oppressive to require corporate officers to make such affidavit and yet to leave every "partnership, individual or association of individuals" (also within the Missouri law against monopolies, secs. 10299, 10303) in the same situation and circumstances, immune from such requirement; and in affirming the judgment of the said Circuit Court to that effect, said Supreme Court denied to plaintiff in error rights, privileges and immunities claimed by it in all the courts below under the Constitution of the United States (14th Amendment thereto).

VIII

The said Supreme Court of Missouri erred in affirming the judgment of the said Circuit Court, City of St. Louis, because the affidavit prescribed by the statute of Missouri mentioned in the petition in this case is not "due process of law" to enforce the local law, because the same discriminates against defendant as a business corporation and against its officers aforesaid, in favor of partnerships, individuals or association of individuals, none of whom are required to make such affidavit; and thereby "due process of law" and rights,

privileges and immunities of appellant (plaintiff in error) are denied to it and to its officers, as persons and individuals, by said affirmance of judgment, contrary to the Constitution of the United States (14th Amendment thereof).

IX

The Circuit Court erred in overruling the demurrer of defendant on the assignment of the 14th Amendment to the federal Constitution (Rec., p. 9) as a bar to the forfeiture demanded by the petition, and the State Supreme Court erred in affirming that ruling.

X

The Circuit Court erred in refusing to give the second request for a declaration of law (Rec., p. 31) asked by defendant, invoking for defendant the protection of the provisions of the 14th Amendment to the federal Constitution; and the State Supreme Court erred in affirming that ruling.

XI

The said Circuit Court, City of St. Louis, erred in entering judgment of forfeiture against relator, under sec. 10322 (R. S. Mo., 1909) which statute violates rights and privileges of plaintiff in error to due process of law and to the equal enforcement of the law in the particulars already specified herein, and denying thereby to plaintiff in error and to its said officers, rights, privileges and immunities secured to them by the terms of the 14th Amendment to the Constitution of the United States; and the Supreme Court likewise erred in affirming said circuit judgment, and thereby confirming the same result.

BRIEF OF THE ARGUMENT

Plaintiff in error earnestly appeals to this Court of last resort to apply the guaranties of the federal Constitution to the facts of this record.

If those facts have been already developed so as to be clearly understood, we hope no elaborate argument will be needful to show that several features of the local law in question pass beyond the limits set by the organic law of our country for the protection of the rights of even the humblest citizen.

We shall endeavor briefly to group our comments on the facts into as narrow compass as possible.

The Missouri Law

All the Missouri Statutes against Pools and Conspiracies which are to any degree applicable will be printed in an *Appendix* as part of this Brief, in order that your Honors may have conveniently at hand a view of the whole local law of the subject, so that the force and bearing of the chief section (R. S. Mo., 1909, sec. 10,322) may be better appreciated than otherwise. That section is as follows:

(*b*)

"Sec. 10322. **Secretary of State to Make Inquiry —Form of Affidavit.**—It shall be the duty of the Secretary of State, on or about the first day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this State, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article 1 of this

chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be inclosed in said letter of inquiry as follows:"

"AFFIDAVIT"

(Here follows the form of affidavit required.)
(See Appendix, p. 247)

"And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the prosecuting attorney of the county or the Circuit Attorney in the City of St. Louis, wherein said corporation is located, and it shall be the duty of such Prosecuting Attorney or Circuit Attorney, at the earliest practicable moment, in the name of the State, and at the relation of said Prosecuting or Circuit Attorney, to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this state: *Provided, however,* that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the Court may assess against such corporation, in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this State, a fine not to exceed five thousand dollars and not less than one hundred dollars: *Provided, however,* that any time before final judgment, if such corporation shall file or cause to be filed with the Secretary of State the affidavit

herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fees of ten dollars, to be paid to the Prosecuting Attorney or the Circuit Attorney in the City of St. Louis, remit the penalty herein prescribed (Laws 1907, p. 374)."

The claims of plaintiff in error are that this requirement, as interpreted and applied by the Supreme Court of Missouri, is in some aspects impossible, and in others forbids acts entirely innocent under all the laws of the State, and hence is not "due process" of law, and is, moreover, an infringement of the guaranty of "equal protection of the laws", and hence is within the corrective reviewing supervision of this Court.

I

The requirement of an affidavit that the Company "has not issued and does not own any trust certificates" is not "due process of law".

What does the language of that requirement mean?

Are all "trust certificates" which a corporation may issue illegal, under the laws of Missouri?

Are all "trust certificates" which a corporation may own illegal?

What is within the meaning of the term "trust certificates"?

Are there not many "trust certificates" which a corporation in these days may own without being in danger of forfeiting its Charter?

Is there any explanation afforded by the affidavit to inform or advise affiant what "trust certificates" are

those his Company may **"not own"**, under penalty of disfranchisement as a corporation?

Note well, please, what affiant must swear to (under penalty of forfeiture of his Company's Charter), namely: that the Company "has not issued" any trust certificates, and "does not own any trust certificates"!

If the Company either has issued or owns any "trust certificates" the affidavit cannot be made by any of its officers.

"Trust certificates" and "trust receipts" are ordinary kinds of business documents representing interests in property, and are not illegal in themselves. They often are mentioned as legitimate evidences of title.

In re Coe, 183 Fed. 745
In re Reboulin Fils & Co., 165 Fed. 246-7
Brown v. Billington, 163 Pa. 76 (29 Atl. 904), 43 Am. St. 780

Does such a law conform to the principles of justice which enter into the now-established meaning of "due process of law", as interpreted by this Court?

In a recent and very important judgment here, a law whose vagueness in the use of the term "real value" had challenged review, notwithstanding the approval of the state courts, was held fatally deficient as falling below the federal standard, tersely announced as follows:

> "It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable."
>
> Collins v. Kentucky, 234 U. S. 638

Must corporation officers in Missouri guess at what is meant by "trust certificates" or are they entitled to know, by the terms of the law, what they are swearing to?

A similar test to that above quoted was applied in another case, about the same time, by an opinion which declares emphatically the rule we now invoke.

International Harvester Co. v. Kentucky, 234 U. S. 223; 591

Is it "due process of law" to make such a requirement as that demanded by the Missouri law in this particular?

It seems to us that this feature of the statutory form is unreasonable and not "due process of law." It is common knowledge that "trust certificates" may be entirely innocent and the form of affidavit does not limit those words to the scope intended by the definitions in the first article of the chapter on Pools and Conspiracies.

"Trust certificates" are documents which are a lawful species of property. Many companies own trust certificates of various kinds, wherein and whereby syndicates or other associations certify the interests held by the various parties concerned therein without in any way infringing any law against pools or conspiracies in restraint of trade.

The primary and original meaning of "trust certificates" (as shown by the *Century Dictionary* [1911]) is innocent, and without taint of any improper or illegal usage; it is only in a more modern, secondary and colloquial sense that the term is sometimes applied to papers used as evidence of a share or interest in some association formed to [redacted] business interests in a man-

unite

ner objectionable to the laws against such combinations.

To require the officers of a company to make affidavit that it does "not own any trust certificates" is, we most respectfully submit, a feature of the requirements which not only makes the demand too uncertain to furnish any rule for human conduct, but passes beyond the scope of the disciplinary power of the law of the subject, and hence is not "due process of law," within the meaning of the Federal Constitution.

It has always appeared to us that if the affidavit made a requirement which went beyond the law of the subject, and could not truthfully be met by one innocent of any invasion of that law, that is, by company officers carrying on ordinary and legitimate business, the requirement would be held invalid, as not "due process of law," following the precepts announced in many Federal decisions which bear upon the interpretation of the organic law of our nation.

Ry. v. Taylor, 198 Fed. 159
Collins v. Kentucky, 234 U. S. 638

We submit that opinion to the judgment of your Honors.

II

The requirement of an unchangeable form which places the sworn date of incorporation later than that of the company in question, so as to make the affidavit impossible, is not "due process of law".

The trial Court erred in not sustaining the demurrer to the evidence because the form demanded of the officers of defendant in the affidavit of innocence

would be false on its face and is hence not "due process".

There is no authority given to alter same in any particular. The official instructions on the margin (Rec., pp. 24-5) declare that it will "not be accepted if **any changes or erasures** are made in the form". The defendant, as the records in the office of the Secretary of State show (Rec., p. 25), was incorporated in 1882. Hence it would not be truthful but false for any officer thereof to swear that it was incorporated in "19...", as the form in the statute demands, without some change or erasure, either of which is forbidden.

The statutory form (as recited in the petition and in the statute, section 10322) both include the year "19..." and hence are **not applicable** to corporations organized prior to that time.

This may seem a small matter, but it indicates negligence in legislation on so important a subject. The law should have conferred some latitude or authority to introduce such changes in the merely descriptive parts of the affidavit as would permit persons who are careful and conscientious in making sworn statements, to follow the requirements.

When it comes to imposing penalties and forfeitures great strictness is required. The Supreme Court of Missouri has often held that the omission of the word **"the"**, in language required by the organic law in the closing lines of an indictment, is fatal to validity and to the judgment based thereon.

State v. Skillman, 209 Mo. 408
State v. Campbell, 210 Mo. 202
State v. Warner, 220 Mo. 23

Now it seems to us that, in enacting such drastic and rigid requirements as those contained in section 10322, with an inflexible and immutable form of affidavit, the legislative authors of the language have overdone the matter, in view of the heavy penalties imposed and applicable. And the honored and able Secretary of State has not bettered the matter by the printed instructions accompanying the blank and forbidding "**any** changes or erasures" in the form (Abs., pp. 28-9). If the "19" in the statutory form cannot be changed into an "18" to permit "1882" to appear, how could the officers of the defendant complete the affidavit and obey instructions?

You will not find this point discussed in the learned opinion of the Supreme Court of Missouri. Possibly it was deemed trivial; but a law which imposes such a penalty as forfeiture of a Charter, for failing to make oath to an unchangeable form of affidavit, should be sufficiently clear to permit the oath to be made. If the oath is impossible, as here the record discloses (Rec., p. 25), is the law "due process"? Or must the victim be forced into the procrustean bed, even at every sacrifice?

As to this feature of the affidavit we claim that it presents an impossibility to the affiant, and that the law requiring it is not "due process", as understood in this Court.

III

The Missouri law demands inflexibly the use of a form of affidavit which has a venue in a "County" and a jurat in a "County", whereas plaintiff in error is "located and transacting business in the City of St. Louis", according to the State's petition (Rec., p. 6) and St. Louis City is no part of any County under the constitution and laws of Missouri; so the affidavit is impossible of verification and the law requiring it is not "due process".

It should always be borne in mind that the instructions by the Honorable Secretary of State (Rec., p. 23) no less than the terms of the law, forbid any change whatsoever by the affiant or any correction in the statutory language "prescribed" (sec. 10,322, R. S. Mo., 1909) in the form of the affidavit.

That phase of our review was discussed to some extent in the learned opinion of the Missouri Supreme Court (Paragraph VII; Rec., p. 55), wherein it was held that, as the word "County", in a general law, includes the City of St. Louis (R. S. Mo., 1909, sec. 8057), our objection on the aforesaid ground is untenable. With all due respect, we reply that the ruling does not inform us whether affiant should change the jurat and venue accordingly, or the notary would be thereby warranted in certifying an affidavit taken in St. Louis City as having been taken in a "County", and if the latter, *in what County?*

The venue as well as the official certificate at the end of the affidavit is only applicable to a county. **It could not be certified by any officer authorized to administer oaths in the City of St. Louis without an erasure** in the prescribed and ironclad formula.

A statute inconsistent with the idea advanced in the learned opinion below is found in that governing

notaries public which requires them to show upon their seal whether their appointment and authority are for **"the county or city"**.

> "Sec. 10180. **Seal of office—style of.**—Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public', **the name of the county or city, if appointed for such city,** in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence. (R. S. 1899, § 8835.)"
>
> Mo. R. S. 1909.

No supposed form of affidavit is valid at all unless the locality of jurisdiction is certified.

Barhydt v. Alexander, 59 Mo. Ap. 192

The powers of notaries can only be exercised "within their respective jurisdictions", not elsewhere, as declares the Missouri law:

> "Sec. 6351. **Officers authorized to administer oaths.**—Every court and judge, justice and clerk thereof, and all justices of the peace, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them, respectively, and to administer oaths and take affidavits and depositions within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken. (R. S. 1899, § 8843.)"
>
> R. S. 1899, sec. 8843 (sec. 6351 of 1909)

Notaries take and certify affidavits "in like manner as Justices of the Peace". Mo. R. S. 1909, sec. 10,178.

(*Addendum* p. 27, Brief, Pltf. in Error, U. S. Supreme Court.)

But no officer in the City of St. Louis could validly certify the form of affidavit demanded by this law without erasing and changing the language contained in the statute.

The section of law referred to in the learned opinion below gives no hint of any authority to alter the form **"prescribed"**, in any particular.

The form is essential and no variation is authorized. Section 10,322 declares it a **"duty"** to make answer "by filing or causing to be filed **the affidavit prescribed** herein". Later, in the same section, is mentioned "the **affidavit required** by the provisions of this article", and further on, "the **affidavit herein prescribed**".

Then follows a section which should have carried authority to make any necessary erasures or changes to conform to the facts; but it does nothing of the sort. It sticks close to the only form **permitted or "prescribed"**, saying:

> "SECTION 10323. The **affidavit required by this article** shall be made by the president, secretary, treasurer or managing officer of such corporation in this State, and shall be made before some person authorized to administer oaths in this State."

In the two following sections the **"said affidavit"** is again referred to, and the Secretary of State is given power to demand at any time, on satisfactory evidence, **"the affidavit as above set forth in this article"** (sec. 10325). In the same section, in the language supposed to carry the immunity which effaces the constitutional protection of the individual rights of all managing officers of the corporations in Missouri, we find the statutory form referred to as **"the** affidavit **required by this article"**.

Mo. R. S. 1909, sec. 10325

These statutes always refer to **"the"**, not to **an** affidavit. They go further and rub it in by adding **"prescribed"** by, or **"set forth in"** this article, so as to exclude in every possible way the idea of giving **any latitude** to the affiant. The purpose doubtless is to preclude variation of the essential facts to be verified, but the knot is tied so tightly as to prevent, in many instances, the making of any affidavit at all.

If by the ruling in the learned opinion below that the word *"county"* includes the City of St. Louis it is intended to justify officers within that city in using the word **"county"** as contained in the venue and in the certificate of the prescribed form of affidavit in section 10,322 (without any **erasure or alteration** therein) we most respectfully dissent.

State v. Dillon, 87 Mo. 490
Mo. Const. 1875, art. 9, sec. 20

The city is not a county under the laws for certifying such documents, and section 8057 (which the learned opinion of the Supreme Court of Missouri cites) does not seem to us to supply authority for treating the city as a county. It is no part of any county. That section is as follows:

> "Sec. 8507. Additional rules for construing statutes.—The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute:" * * * "nineteenth, whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the City of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city;" * * *

Does that language warrant an affidavit on this form by a resident of St. Louis City without alteration in its immutable terms? Not if the rulings in that State as to the severance of the City from the rest of the State are correct!!

Steffen v. St. Louis, 135 Mo. 44
Gracey v. St. Louis, 213 Mo. 384
State v. Dillon, 87 Mo. 490

The city has been separated from the county under provisions of the Missouri Constitution, and laws enacted in pursuance thereof.

Const. Mo. 1875, Art. IX, secs. 20-25

R. S. Mo. 1909, sec. 3508, viz:

> "Sec. 3508. State divided into one hundred and fourteen counties and one city.—This state is divided into one hundred and fourteen counties and one city, by the names and designations following:" (Then follow the names of 114 counties, and "City of St. Louis").

We submit most respectfully that the requirement of the Missouri law demanding use of such an affidavit-form is an impossibility, and that it is not properly a local question. As the law has been applied by the state authorities, it is not "due process" as demanded by the federal Constitution, since to require an impossibility under pain of forfeiture of the company charter would be very far away from "due process" of law.

IV

The demand of this law for an affidavit of innocence by managing officers of corporations, to disprove guilt under the law against pools and conspiracies in restraint of trade, is an unjust discrimination against them, and denies them, as well as defendant, the "equal protection of the laws" and hence violates the 14th Amendment of the Federal Constitution

"The trial Court, by refusing the peremptory instruction for defendant, denied to defendant and its officers the equal protection of the laws guaranteed to them by the 14th Amendment to the Federal Constitution, and denied to defendant and its officers their rights and immunities thereby secured, in that it is unreasonable and oppressive to require corporate officers to make such an affidavit of innocence, and yet to leave every **"partnership, individual or association of individuals"** (also within the law against monopolies, sections 10299, 10303) in the same situation and circumstances immune from such requirement."

The result of the judgment of affirmance deprives plaintiff in error and its officers of the **equal protection of the laws,** and hence is an infringement of its rights secured by the Federal Constitution.

Persons who are officers of corporations are alone required to make exculpatory affidavits under sec. 10322, whereas partnerships, individuals and other associations, besides corporations, are (by other parts of the law as to Pools and Monopolies) within the same inhibition as corporations (Sec. 10303).

No reasonable ground exists for discriminating between persons who are officers of a corporation and those who fall within the terms of sec. 10303 and who

are not such officers. The "equal protection" should reach both.

Of course, corporations may be subjected (by the State of their creation) to valid conditions and terms as part of the law of their being, and foreign companies may have conditions imposed on their entry into other states; but here the requirement bears on the persons who are officers of either foreign or domestic corporations. Why they are selected and not those other persons who are doing business as described in secs. 10298, 10303 is, we submit respectfully, an infringement of the immunities of those here in question, in view of the federal and state decisions.

Gulf Ry. v. Ellis, 165 U. S. 150
Ry. Co. v. Taylor, 198 Fed. 159
Paddock v. Ry., 155 Mo. 537

In the last cited case, the distinction we invoke is clearly stated and applied.

Corporations are within the 14th Amendment of the Federal Constitution and certainly its officers are, so that, subject to a legitimate exercise of the police power, no state should deny them the equal protection of the laws.

A state statute undertaking to regulate the business of a railroad company, which fixes penalties for disobedience of its provisions so excessive as to effectually prevent the company from resorting to the courts to test its validity, is unconstitutional as depriving the company of the equal protection of the laws.

Wilmington City Ry. Co. v. Taylor, 198 F. 159
Mo. Pac. Ry. Co. v. Tucker, 230 U. S. 340
Ex parte Young, 209 U. S. 123 (13 L. R. A. [N. S.] 932—Note)

The idea of those rulings is the same expressed in varying forms in many decisions: that there should appear or be manifest some reasonable ground for differentiating one class of persons from others, in the same situation and circumstances, in applying the penalties of state laws if the latter are to accord with that equal justice in legislation which the federal compact demands.

One of the most careful statements of a practical guide toward the interpretation of this part of the Amendment is found in a decision wherein a law of California was held valid as applying to all persons engaged in the laundry business, although the regulations thereby imposed were not extended to other kinds of business. In treating this subject, Mr. Justice FIELD, with the concurrence of the whole Court, gave the following tangible and useful rule:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."
>
> Soon Hing v. Crowley, 113 U. S. 709

The spirit of the federal requirement on this point is outlined in another opinion thus:

> "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the desig-

nation of 'person' there is no doubt that a private corporation is included."

Pembina Mining Co. v. Pennsylvania, 125 U. S. 188

That language is quoted later as a correct interpretation of the organic law in

So. Ry. Co. v. Greene, 216 U. S. 412

In the latter case Mr Justice Day contributes another useful definition to this topic:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."
>
> Southern Railway Co. v. Greene, 216 U. S. 417

The case at bar presents a state of facts which appeals strongly for the enforcement of that rule.

The Missouri laws to suppress and prevent pools and conspiracies in restraint of trade are directed at all the "persons" included in the definition of that term by the statute (sec. 10,309) as already quoted in this Brief (p. 4). Those "persons" are "natural persons, partnerships, associations of persons and corporations" (whether of home or foreign origin).

Are they treated equally or evenly by the law, in the same situation and circumstances?

Heavy penalties are imposed on individuals (sec. 10,302, R. S. Mo., Appendix to this Brief, p. 242) as

also on corporations who shall forfeit their corporate rights and franchises (sec. 10,304) and property, if guilty of breach of the law against pools and conspiracies (sec. 10,304, R. S. Mo., see Appendix hereto, p. 242).

Then comes the special selection of the officers of corporations from all the other persons at whom the law is aimed, and they are subjected to several unique penalties not imposed on the other persons within the purview of the chapter on Pools and Conspiracies.

Those persons who are managing officers of corporations, namely: the "president, secretary or managing officer" must "answer under oath" the "letter of inquiry" of the Secretary of State whether the corporation has any part of its business or interest in or with any trust or combination (as named in the preceding provisions of the chapter on this subject).

The prescribed form of answer under oath is an **affidavit** of procrustean rigor, unchangeable and inflexible in any particular (R. S. Mo., 1909, sec. 10,322, Appendix hereto, pp. 247-8).

The penalty to "every person" who makes such affidavit, knowing it to be false (sec. 10,324, R. S. Mo. 1909, Appendix hereto, p. 249) is perjury; and then the law attempts to impart an immunity to the corporate officers, affiants, in an imperfect way, not commensurate with the constitutional guaranty against self-incrimination.

Although that defect in the state law may not, perhaps, be directly within reach of federal cognizance, it is noteworthy as indicating the special and unreasonable burdens which the law imposes on those persons who are corporate officers, singling them out for that purpose and leaving the other persons (at whom the

law in its general purposes is aimed) immune from its odious imputations and penalties.

By demanding such an affidavit of those persons (whose peculiarity is only that they are entrusted by their corporations with the duty of management) the State discriminates against them and denies to them equal protection to that allowed to other persons in business, in the same situation and circumstances.

The discrimination against this class of persons is:

> **1. In depriving them and their corporation of the benefit of the *presumption of innocence* which is accorded to other persons to whom the law may apply in like circumstances; and**
>
> **2. In shifting the *burden of proof* as to guilt so as to impose that burden on them, whereas that burden rests on the State as to other persons who may be within reach of the terms of the law, in precisely identical circumstances.**

Twenty years ago the Supreme Court of Missouri held that the requirement of such an affidavit of innocence was an infringement of the guaranties (as to the company and its managing officers) which exist in their favor against self-incrimination.

Const. Mo., Art. 2, Sec. 23
State *ex rel.* v. Simmons Hardware Co., 109 Mo. 118
State v. Young, 119 Mo. 495
State v. Naughton, 221 Mo. 425
Ex parte Gauss, 223 Mo. 285

Since then the statute in question has been amended. In the following language appears the attempt to confer a limited immunity, as part of sec. 10325:

> "Sec. 10325. * * * In case of a failure of compliance on the part of the corporation, then

the same procedure shall ensue as is provided in section 10322 of this article: *Provided*, that no person shall be subject to any criminal prosecution on account of any matter or thing **truthfully disclosed by the affidavit** required by this article; *and provided further*, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him **or subject him to a penalty or a forfeiture**; but no person shall be subject to prosecution **or to any action for a penalty or a forfeiture** on account of any transaction, matter or thing concerning which he may **testify or produce books or papers.**''

(**Display** type is ours.)

(Mo. R. S. 1909, sec. 10325, Appendix hereto, p. 249)

Your Honors will observe that the immunity extended to a witness in testifying or producing books or papers, in a prosecution **or proceeding to enforce the provisions of this article** reaches anything which ''might tend to incriminate him **or subject him to a penality or forfeiture**; whereas, in the first *proviso* (referring to disclosures by such an affidavit of innocence) the immunity extends only to any **''criminal prosecution''**, and does not even preclude the use of such affidavit in a proceeding to recover a **''penalty or forfeiture,''** as is in the second *proviso* ordained.

The term *''criminal prosecution''* (standing alone as here) has been held, in most carefully considered judgments, to be much more narrow than ''criminal

case" or "criminal cause" (which is the language of the Missouri organic law) and hence **insufficient** to avoid the effect of the protection given against self-incrimination, because the immunity intended to be given by that term is not (to quote from a late report) **"commensurate with the protection guaranteed by the constitutional limitation."**

Glickstein v. U. S., 222 U. S. 141

In the last cited decision an earlier one of the same court is followed and approved, which had given the lead to the Missouri decision already mentioned, as shown by the report (109 Mo. 126).

Counselman v. Hitchcock, 142 U. S. 547

Other parts of the Missouri statute on this subject confirm the interpretation we ascribe to section 10322, as witness the later provisions in regard to obtaining and recording testimony in suits to enforce the provisions of that chapter as well as the provisions imposing penalties and forfeitures (besides and in addition to criminal prosecution) upon all persons or corporations implicated in unlawful contracts and agreements denounced by that chapter of the Missouri statutes.

The general rule we invoke as to the construction of section 10325 is sustained by long lines of decisions collected in

30 A. & E. Ency. L. (2nd ed.), p. 1161
See also People v. O'Brien, 176 N. Y. 261
In re Nachman, 114 Fed. 996

The language of the *Penal Code* of New York, which was held in the *O'Brien case* too narrow in its grant of immunity, may well be quoted:

> Sec. 342. "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding."

The immunity attempted to be given by the Missouri section 10325, in respect of disclosures by the **affidavit** required, is obviously much too narrow, not only as shown by that section, but also when the federal law concerning monopolies is considered, whereby an action is given to any person injured in his business or property by any **person** or corporation by reason of anything forbidden or declared unlawful by the Federal law against monopolies or contracts in restraint of trade. Such person "may sue therefor * * * "and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

(26 St. L. 210) 7 Fed. Stats. Annot., p. 345

We cite the above as tending to show (with all due respect) how futile is the claim that the terms of section 10325 afford complete immunity to disclosures which such an affidavit might make.

Please compare the federal immunity Act of February 25, 1903, ch. 755, to see how far short fall the terms of section 10325 of the Missouri law (as to the **affidavit** in question) from the measure of immunity given by the federal statute, from which we quote the following:

> "*Provided*, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or

on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said Acts: *Provided, further,* that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

10 Fed. Stats. Annot., pp. 173-4 (32 Stat. L. 903)

The above language of the Federal law is almost identical with that used to confer immunity on a witness testifying or producing papers under the **second proviso** of section 10325 (R. S. 1909) in Missouri, but as to **officers of companies who may make affidavits** the protection conceded (by the terms of the **first proviso)** in that section is **far less, and not commensurate with the constitutional guaranty** against self-incrimination, as the decisions already cited attest, and for which proposition many more supporting citations could be given, if needful.

The protection of the State Constitution includes not merely witnesses testifying in court, but others who may be called on to state facts under oath in administrative affairs.

"That constitutional inhibition was intended for the protection of personal rights, and a liberal construction should be placed upon it to accomplish the intended purpose. It has been held efficacious to prohibit coercion by statute of self-incriminating testimony, not only in a pending criminal case, but in investigations by grand juries and legislative committees. Statutory requirements for production of books, or making returns by individuals or officers of corporations, concerning their method of doing business, have been held

> invalid on a claim that they might tend to incriminate. The inhibition not only protects one from the disclosure of facts which would tend to prove his guilt, but also from disclosure of facts which might furnish a clue or a link in a chain of evidence by which a criminal offense might be made known."
>
> Edelstein v. U. S., 149 Fed. 642

The decision quoted is by the U. S. Court of Appeals through Judge ADAMS, whose experience and ability upon the State bench were as conspicuous and well known as they are now in the Federal jurisdiction.

We therefore respectfully insist that the supposed "immunity" in the first *proviso* of Missouri section 10325 does not bar the effect of the decision in the *Simmons Hardware Co. case* in Missouri or of the *Counselman case* in the U. S. Supreme Court, and hence that the corporate officers, who make such an affidavit, are subjected to a penalty and requirement far more burdensome than others, since they remain in jeopardy of civil penalties despite the attempt to grant them immunity.

But even if that phase of the law (sec. 10,325) accords sufficient immunity to satisfy the state organic commands, does it any the less impose a heavier burden by turning back the presumption of innocence and imposing an inference of guilt upon such persons as manage corporations, leaving to persons, in like circumstances, who represent individuals or partnerships (engaged in the same lines of business) free of such odious imputations?

Does the demand of such an affidavit by the State law comport with the right and immunity conferred by

the federal Constitution to "equal protection" of the laws?

No one has yet pointed out, in this litigation, any reason or ground for imputing to persons, who may be officers managing the affairs of a corporation, such turpitude as requires them to remove a *prima facie* inference or presumption of guilt, while according to similar managers of a partnership, in identical circumstances, the usual presumption of innocence of any infraction of the terms of the general law of this subject.

A corporation may be deprived of its charter for mere failure of its managing officer to file the affidavit of innocence, according to the application of this law (sec. 10,322) by the Supreme Court of Missouri, **without any allegation or proof** that it ever was a party to any pool or combination in restraint of trade, while no such result follows the omission of individuals or partnership to file such an exculpatory affidavit in the same circumstances, and in the same lines of business.

We earnestly submit that, according to all the expositions in this Court of the meaning to be ascribed to the guaranty of "equal protection of the laws", the Missouri law in question falls short of answering its requirements.

In addition to the decisions already mentioned to illustrate the principles we invoke, we cite:

Connolly v. Pipe Co., 184 U. S. 556
Ins. Co. v. Carnell, 110 Fed. 823
Brown v. Jacobs Co., 115 Ga. 429
Raymond v. Chicago Co., 207 U. S. 20

The gist of the rulings in this Court, at least, is that all persons in like circumstances, in like conditions and in the same lines of business, should have equal pro-

tection of the laws applicable to the subject; by which is meant that a discrimination which may impose on particular persons (within the scope of the law) a heavier burden of penalty than other persons are to bear, in the same situation and circumstances, should appear to be founded on some reasonable grounds. The claim of plaintiff in error here is that the Missouri law in question puts those persons who are corporate officers, in any line of business, into a different class from other persons, individuals and partnerships, who are in the same lines of business in the same situation, and imposes heavier penalties on the one class than on the other.

State v. Ashbrook, 154 Mo. 395

Summary

The learned opinion of the Supreme Court of Missouri will be searched in vain for any intimation that an affiant may alter or change in any particular the statutory form prescribed in sec. 10,322, already quoted. If another interpretation had there been given to the law, if some latitude had been discovered, in the terms of that statute, to sanction at least minor alterations in the printed form "**prescribed**" (to quote the exact language) the case would bear a different aspect. But the inflexible application of the statute by the Supreme Court of Missouri in such a way as to forfeit the Charter of the plaintiff in error for failure to file an affidavit (which in the form "*prescribed*" is impossible for defendant truthfully to verify) leaves the statute barren of any justification as "due process of law", according to all standards.

Aside from the just and far-reaching guaranty of the 14th Amendment as to "due process" and "equal pro-

tection of the laws" the general rules for interpreting laws would condemn and discard legislation which prescribes an impossibility. A statute making a demand of some person within its terms which, on the admitted facts, that person could not comply with, even if innocent of any wrong doing within the purview of the legislation, should fail; as being far from "due process of law".

Lex non cogit ad impossibilia.

Provisions or requirements of statutes which are either too vague and uncertain to define a rule of conduct, or which define a rule of conduct impossible of performance by one innocent of any wrongful act within the mischief at which the enactment is aimed, are equally void; and in effect no law at all.

Laws imposing penalties are peculiarly within this rule.

> "If the legislature enacts an impossibility, no court will undertake to carry it into effect."
> Bishop, Stat. Crimes (2 ed.), sec. 41

To same effect, as to the general rule:
26 A. & E. Ency. L. (2 ed.), p. 656
(and many cases there cited)

For stronger reason are such impossible penal enactments rightly regarded as far short of "due process" of law, according to the tests of justice and fair dealing embodied in the most recent expositions by this Court.

Harvester Co. v. Kentucky, 234 U. S. 223
Collins v. Kentucky, 234 U. S. 638

The Supreme Court of Missouri (in an earlier case)

holding a statute void on the ground we now are discussing, held:

> "This attempt at legislation is so indefinite and uncertain, by reason of the effort to regulate the disposition of a great number of franchises by one general rule, that we must hold it incapable of practical operation and enforcement. Its provisions are so obscure that it is impossible to ascertain and declare their proper meaning. 'If the terms in which "a statute" is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative.' "
>
> State v. R'y Co., 146 Mo., p. 175

An eminent English commentator on interpretation has expressed the rule we invoke as follows:

> "Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia.* They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible."
>
> * * * * * * * *
>
> "In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so, where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown."
>
> Maxwell, Interp. Stats. (4 ed.), pp. 577-8

These precepts we deem applicable here.

For plaintiff in error we insist that, in the manner in

which the statute in question is applied by the Supreme Court of Missouri, it demands (upon penalty of forfeiture of franchise) impossibilities, in the unchangeable and "**prescribed**" form set forth (sec. 10322) and approved by the Court:

1. It demands that the Company "has not issued and does not own **any trust certificates,**" when no explanation of the meaning of that term is given by the affidavit to restrict or limit its scope to unlawful certificates under the pools and conspiracies statutes; but includes all trust certificates.

2. It demands an oath that the corporation was incorporated in "19—", when this Company was incorporated in 1882, as the State records attest;

3. It demands a venue and jurat in a "County", when the domicile of this Company is not within any county of Missouri;

4. It puts the persons who are officers of corporations under an imputation of guilt, and **shifts the burden of proof as to them,** while other individuals, "natural persons, partnerships and associations of persons" (sec. 10,309, Appendix, p. 244) are under no such imputation and have no need to file any exculpatory affidavit, though they may be in precisely similar business, and in the same situation as the corporation whose officers are singled out as the statute indicates.

5. The rigor of the demand of this affidavit, permitting no variation to conform to any innocent differences in facts, puts that law on trial in all its literal and unchangeable inflexibility.

As such, it appears to us unconstitutional as a basis or ground to forfeit a Charter which is valuable property of defendant.

In Conclusion, we submit that if the local statute had been construed to permit some flexibility in its use to conform to the facts, the case might be different; but, as approved by the Supreme Court of Missouri, without allowing in the affidavit the alteration of jot or tittle, we earnestly insist that the statute fails to conform to the time-honored guaranties to liberty and property, expressed in the 14th Amendment of the federal Constitution.

We respectfully submit that the judgments below should be reversed.

S. Mayner Wallace
Wm. R. Orthwein
Shepard Barclay
Of Counsel for Plaintiff in Error

St. Louis, Mo.
January, 1915

APPENDIX

to

BRIEF OF PLAINTIFF IN ERROR

Mallinckrodt Chemical Works
Plaintiff in error

vs.

State of Missouri *ex rel.*

Missouri Statutes

on

Pools, Combinations, Etc.

Secs. 10,298-10,335

CHAPTER 98.

POOLS, TRUSTS, CONSPIRACIES AND DISCRIMINATIONS.

ARTICLE I—Definitions, procedure and penalties.
II—Unlawful discriminations.
III—Reports, affidavits, etc.
IV—Testimony, how obtained.
V—Taking testimony before institution of proceedings.

ARTICLE I.

DEFINITIONS, PROCEDURE AND PENALTIES.

SECTION
1. Repealing and re-enacting article I, chapter 98, R. S. 1909.
10298. Combinations in restraint of trade declared a conspiracy.
10299. Pool and trust agreements defined.
10300. Combinations to boycott or threaten to boycott made a conspiracy.
10301. Combination to increase prices, declared conspiracy.
10302. Penalties.
10303. Jurisdiction of circuit courts—duties of prosecuting attorneys.
10304. Offending corporations to forfeit charter and property.
10305. Persons injured to recover triple damages.
SECTION
10306. Corporations not to issue trust certificates or to place output in hands of trustee.
10307. Purchaser not liable for price of article, when.
10308. Effect of forfeiture of corporations.
10309. "Person" or "persons" defined.
10310. Sufficiency of pleadings.
10311. Witnesses—production of books and papers.
10312. Sufficiency of indictments and informations.
10313. Act not to affect pending litigation.
10313a. What shall be *prima facie* evidence in proceeding against insurance companies.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Repealing and re-enacting article I, chapter 98, R. S. 1909.—That article 1, chapter 98, of the Revised Statutes of Missouri, 1909, entitled "Pools, trusts, conspiracies, and discriminations," be and the same is hereby repealed and a new article to be known as article 1, chapter 98, be enacted in lieu thereof, and composed of sections to be numbered 10298, 10299, 10300, 10301, 10302, 10303, 10304, 10305, 10306, 10307, 10308, 10309, 10310, 10311, 10312 and 10313.

Sec. 10298. Combinations in restraint of trade declared a conspiracy.—Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. (Laws 1913, p. 550.)

Sec. 10299. Pool and trust agreements defined.—Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, conferedation, or understanding with any other person or persons to regulate, control or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or participate in any pool, trust, agreement, contract, combination, confederation or understanding, to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and be punished as provided for in this article. (Laws 1913, p. 550.)

Sec. 10300. Combinations to boycott or threaten to boycott made a conspiracy.—Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party to such pool, trust, combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this article. (Laws 1913, p. 550.)

Sec. 10301. Combinations to increase prices, declared conspiracy. All arrangements, contracts, agreements, combinations or understandings made, or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this state of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever, including the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, and all arrangements, contracts, agreements, combinations or understandings made or entered into between any two or more persons which are designed or made with a view to increase, or which tend to increase the market price of any product, commodity or article or thing, of any class or kind

whatsoever bought and sold, including the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, are hereby declared to be against public policy, unlawful and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this article. (Laws 1913, p. 551.)

Sec. 10302. Penalties.—Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. (Laws 1913, p. 551.)

Sec. 10303. Jurisdiction of circuit courts—duties of prosecuting attorneys.—The several circuit courts of this state are hereby invested with jurisdiction to prevent and restrain any person or persons, corporation, partnership, individual or association of individuals from entering into any combinations, pools, agreements in the form of trusts, confederation, conspiracy or understanding declared illegal by this article, or any other law of this state relating to pools, trusts, conspiracies and unlawful combinations. And it shall be the duty of the attorney general and of the prosecuting attorneys to institute proceedings in equity to prevent and restrain all violations of this article and of any other law concerning pools, trusts and conspiracies and unlawful combinations. Such proceedings may be by way of petition, setting forth the case and praying that such violation be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may, at any time, make such temporary restraining order or prohibition as shall be deemed just in the premises. (Laws 1913, p. 551.)

Sec. 10304. Offending corporations to forfeit charter and property.—Any corporation created or organized by or under the laws of this state which shall violate any of the provisions of this article may, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its corporate rights and franchises, and the same may by the court be declared forfeited, void and of noneffect, and shall thereupon cease and determine; and such court may, by such judgment and decree, also declare all or any part of the property of such corporation forfeited unto the state, or in lieu of the forfeiture of its corporate rights and franchises, or in lieu of the forfeiture of all or any part of the property of such corporation, assess against it a fine; and any corporation created or organized by or under the laws of any other state or country which shall violate any of the provisions of this

article shall, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its right and privilege thereafter to do any business in this state, and the same shall by the court be declared forfeited, void and of noneffect, and shall thereupon cease and determine; and such court may, by judgment and decree, also declare all or any part of the property in this state of such corporation forfeited unto the state, or in lieu of the forfeiture of its right and privilege to do business in this state or in lieu of the forfeiture of all or any part of the property of such corporation, assess against it a fine; and in all proceedings for the violation of any of the provisions of this article against any corporation created or organized under the laws of this or any other state or country, proof of the acts of any person who has been acting as the agent of such corporation in transacting its business in this state in the name, behalf or interest of such corporation shall be received as *prima facie* proof of the acts of the corporation itself; and it shall be the duty of the clerk of the court in which any judgment of forfeiture shall be rendered, as herein provided for, to certify the decree thereof to the secretary of state, and if it be an insurance company, also to the superintendent of the insurance department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation; and in case any court shall render a decree forfeiting all or any part of the property of any corporation violating the provisions of this article, such court shall also appoint a receiver thereof to dispose of the same in such manner as the court may direct, and the net proceeds arising from the sale thereof shall be paid into the state treasury, as shall all fines that may be imposed against any person or corporation violating the provisions of this article, be paid into the state treasury. (Laws 1913, p. 552.)

Sec. 10305. Persons injured to recover triple damages.—Any person injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this article may sue therefor in any circuit court of this state in which the defendant or defendants, or any of them, reside, or have any officer, agent, or representative, or in which any such defendant or any agent, officer or representative may be found, without regard to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. (Laws 1913, p. 553.)

Sec. 10306. Corporations not to issue trust certificates or to place output in hands of trustee.—It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employee, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix

the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. (Laws 1913, p. 553.)

Sec. 10307. Purchaser not liable for price of article, when.—Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this article shall not be liable for the price or payment of such article or commodity, and may plead this article as a defense to any suit for such price or payment. (Laws 1913, p. 553.)

Sec. 10308. Effect of forfeiture of franchises of corporations. Whenever the corporate rights and privileges of any corporation organized under the laws of this state shall have been declared forfeited by a judgment of a court of competent jurisdiction for any violation of the provisions of this article, and whenever the rights and privileges of any corporation organized under the laws of any other state or country to do business in this state have been declared forfeited by a judgment of a court of competent jurisdiction for the violation of any of the provisions of this article, it shall thereafter be unlawful for any person, corporation, or association of persons, to deal in or offer for sale in this state any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or article or thing whatsoever, or contract of insurance against loss or damage by fire, lightning or storm, made, produced, manufactured or dealt in by any corporation whose rights, franchises or privileges have been so declared to be forfeited; and the foregoing provisions of this section are hereby made applicable in all respects to the successors or assigns of any corporations whose rights, franchises or privileges have been so declared to be forfeited. (Laws 1913, p. 554.)

Sec. 10309. "Person" or "persons" defined.—The words person or persons, used in this article, shall be deemed to include natural persons, partnerships, associations of persons and corporations created or organized by or under the laws of this state, or under the laws of any other state or country. (Laws 1913, p. 554.)

Sec. 10310. Sufficiency of pleadings.—In any suit that is now pending, or which may hereafter be brought, in which it is charged that any person, corporation, partnership or association of persons has created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding in restraint of trade or competition with any other person, corporation, partnership or association of persons, it shall not be necessary to allege or plead the manner in which, or when or where such pool, trust, agreement, combination, confederation or understanding was made or effected. (Laws 1913, p. 554.)

Sec. 10311. Witnesses—production of books and papers.—In any proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material

to the matter in controversy, or shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such questions might tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (Laws 1913, p. 554.)

Sec. 10312. Sufficiency of indictments and informations.—In any indictment or information for the violation of any of the provisions of this article, or for the doing of anything forbidden or declared unlawful by the provisions of this article, it shall be sufficient to allege that any person or persons have created, entered into, become members of or participated in any pool, trust, agreement, combination, confederation or understanding without alleging the manner in which such pool, trust, agreement, combination, confederation or understanding has been effected, and it shall not be necessary to allege how, when or where such pool, trust, agreement, combination, confederation or understanding was effected.

Sec. 10313. Act not to affect pending litigation.—The enactment and taking effect of this article shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred by any corporation or person on account of the violation of any law of this state prior to the taking effect of this article. (Laws 1913, p. 554.)

Sec. 10313a. What shall be prima facie evidence in proceeding against insurance companies.—In any proceeding against or prosecution of any insurance company under the provisions of this article, it shall be *prima facie* evidence that such company is a member of a pool, trust, agreement, confederation or understanding to control, effect or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, if it be shown that such company or any agent or representative thereof, in writing insurance, has used any insurance rate, or made use of or consulted any rate book, paper or card containing any insurance rate, prepared, published, kept or furnished by any person, association of persons or bureau employed by, representing or acting on behalf of any other insurance company or association in and about the making and publishing of insurance rates for use in any portion of this state. (Laws 1913, p. 554.)

ARTICLE II.

UNLAWFUL DISCRIMINATIONS.

SECTION		SECTION	
10314.	Unfair discriminations, prevention of.	10318.	Duty of secretary of state when complaint is made.
10315.	Penalty.	10319.	Forfeiture of permit for violation.
10316.	Contracts declared void.	10320.	Attorney-general to institute suit.
10317.	Duty of prosecuting attorneys and attorney-general.	10321.	Remedy not exclusive.

Sec. 10314. Unfair discriminations, prevention of.—Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Missouri and engaged in the production, manufacture, purchase, sale or distribution of any commodity or article of commerce in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer of such commodity, or to prevent the competition of any person, who in good faith intends and attempts to become such dealer, shall discriminate between different sections, localities, commodities, cities or towns of this state, by purchasing such commodity or article at a higher price or rate in one section, locality, community, city or town, than is paid for the same commodity or article by the said person, firm, company, association or corporation, in another section, locality, community, city or town; or by selling such commodity or article in one section, locality, community, city or town at a lower price or rate than such commodity or article is sold for by said person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture or storage, or from the point of production, manufacture, or storage to the place of sale or distribution, or by giving or paying or promising to give or pay a secret or private rebate or bonus in connection with the purchase, sale or distribution of any commodity or article of commerce, shall be deemed guilty of unfair discrimination which is hereby prohibited and declared unlawful. (Laws 1913, p. 555.)

Sec. 10315. Penalty.—Any person, firm, company, association or corporation violating any of the provisions of the preceding section, and any officer, agent or receiver of any firm, company, association or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred dollars nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or suffer both penalties. (Laws 1907, p. 234.)

Sec. 10316. Contracts declared void.—All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void. (Laws 1907, p. 234.)

Sec. 10317. Duty of prosecuting attorneys and attorney-general. It shall be the duty of the prosecuting attorneys, in their counties, and the attorney-general to enforce the provisions of the preceding sections of this article by appropriate actions in courts of competent jurisdiction. (Laws 1907, p. 234.)

Sec. 10318. Duty of secretary of state when complaint is made.—If complaint shall be made to the secretary of state that any corporation authorized to do business in this state is guilty of unfair discrimination within the terms of this article, it shall be the duty of the secretary of state to refer the matter to the attorney-general, who may, if the facts justify it in his judgment, institute proceedings in the courts against such corporation. (Laws 1907, p. 234.)

Sec. 10319. Forfeiture of permit for violation.—If any corporation, foreign or domestic, authorized to do business in this state, is found guilty of unfair discrimination, within the terms of this article, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this state. (Laws 1907, p. 234.)

Sec. 10320. Attorney-general to institute suit.—If, after revocation of its permit, such corporation, or any other corporation not having a permit, and found guilty of having violated any of the provisions of this article, shall continue or attempt to do business in this state, it shall be the duty of the attorney-general, by a proper suit in the name of the state of Missouri, to oust such corporation from all business of every kind and character in said state of Missouri. (Laws 1907, p. 234.)

Sec. 10321. Remedy not exclusive.—Nothing in this article shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. (Laws 1907, p. 234.)

ARTICLE III.

REPORTS, AFFIDAVITS, ETC.

SECTION		SECTION	
10322.	Secretary of state to make inquiry—form of affidavit.	10326.	Duty of attorney-general, circuit and prosecuting attorneys—compensation.
10323.	Affidavit by, and before whom made.	10327.	Judgments—fees of prosecuting officers.
10324.	Penalty for false affidavit.	10328.	Duty of county officers to furnish certain information.
10325.	Duty of secretary of state—production of books.		

Sec. 10322. Secretary of state to make inquiry—form of affidavit. It shall be the duty of the secretary of state, on or about the first day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this state, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article I of this chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

AFFIDAVIT.

State of Missouri, }
} ss.
County of ——— }

I, ——, do solemnly swear that I am the —— (president, secretary or managing officer) of the corporation known and styled ——, duly incorporated under the laws of ——, on the —— day of ——, 19—, and now transacting or conducting business in the state of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said ——, known and styled as aforesaid, is not now, and has not at any time within one year from the date of this affidavit, created, entered into, become a member of or participated in any

pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employe, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract or agreement with any person, association of persons or corporation designed to lessen or which tends to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state, or under the terms of which it is proposed, stipulated, provided, agreed or understood that any particular or specified article, product or commodity shall be dealt in, sold or offered for sale in this state to the exclusion, in whole or in part, of any competing article, product or commodity.

_____,

(President, secretary or managing officer.)

Subscribed and sworn to before me, a —— within and for the county of ——, this ——day of ——, 19—.

(Seal) _____

And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, the secretary of state shall certify said fact to the prosecuting attorney of the county or the circuit attorney in the city of St. Louis, wherein said corporation is located, and it shall be the duty of such prosecuting attorney or circuit attorney, at the earliest practicable moment, in the name of the state, and at the relation of said prosecuting or circuit attorney, to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this state: *Provided, however,* that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the court may assess against such corporation, in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this state, a fine not to exceed five thousand dollars and not less than one hundred dollars: *Provided, however,* that any time before final judgment, if such corporation shall file or cause to be filed with the secretary of state the affidavit herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fees of ten dollars, to be paid to the prosecuting attorney or the circuit

attorney in the city of St. Louis, remit the penalty herein prescribed. (Laws 1907, p. 374.)

Sec. 10323. Affidavit, by and before whom made.—The affidavit required by this article shall be made by the president, secretary, treasurer or managing officer of such corporation in this state, and shall be made before some person authorized to administer oaths in this state. (Laws 1907, p. 374.)

Sec. 10324. Penalty for false affidavit.—Every person who shall make, or cause to be made, and file or cause to be filed, said affidavit, knowing the facts stated therein to be false, shall, on conviction, be adjudged guilty of perjury, and shall be punished by imprisonment in the penitentiary for a term not exceeding seven years. (Laws 1907, p. 374.)

Sec. 10325. Duty of secretary of state—production of books.—It shall be the duty of the secretary of state, at any time upon satisfactory evidence that any company or association of persons duly incorporated under the laws of this or any other state, doing business in this state, has entered into any trust, combination or association, in violation of the preceding sections of this article, to demand that it shall make the affidavit as above set forth in this article as to the conduct of its business. In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in section 10322 of this article: *Provided*, that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article; *and provided further*, that in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (Laws 1907, p. 374.)

Sec. 10326. Duty of attorney-general, circuit and prosecuting attorneys—compensation.—It shall be the duty of the attorney-general, the circuit attorney of the city of St. Louis, and the prosecuting attorney of each county, respectively, to enforce the provisions of this article. The attorney-general, the circuit or prosecuting attorneys shall institute and conduct all suits begun in the circuit courts, and upon appeal the attorney-general shall prosecute said suits in the supreme court and courts of appeal. As compensation for his services in this behalf, the attorney-general shall be entitled to his actual expenses incurred in the prosecution of such suits, to be paid by the defendant or defendants when judgment is rendered for the state. The circuit and prosecuting attorneys shall receive for their compensation one-fourth of the penalty collected. (Laws 1907, p. 374.)

Sec. 10327. Judgments—fees of prosecuting officers.—In all suits instituted under this article to forfeit the charter of corporations, or to forfeit the right of a corporation to do business in this state, where a judgment of forfeiture is obtained and the cause is not appealed to the supreme court or court of appeals, the circuit court rendering such judgment shall allow the circuit or prosecuting attorney a fee of not less than twenty-five dollars nor more than five hundred dollars, to be paid out of the assets of said corporation; and when the attorney-general takes part in said prosecution, he shall be entitled to his actual expenses, to be paid in like manner. (Laws 1907, p. 374.)

Sec. 10328. Duty of county officers to furnish certain information. It is hereby made the duty of all county officers in the state to furnish to the secretary of state any information which he may request of them, to enable him the more fully to execute the duties imposed upon him by this article, and for such services the said county officers shall be paid by their respective counties, upon allowances by the county court, such fees as would accrue for like services for the county. (Laws 1907, p. 374.)

ARTICLE IV.

TESTIMONY—HOW OBTAINED.

SECTION		SECTION	
10329.	The taking of testimony—procedure—witness not relieved from the production of books, when.	10330.	Proceedings upon failure to testify or to produce books, papers, etc.
		10331.	*Ibid.*

Sec. 10329. The taking of testimony—procedure—witness not relieved from the production of books, when.—Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney-general against any corporation or corporations, individual or individuals, or associations of individuals, or joint stock associations or copartnership, under the law against the formation and maintenance of pools, trusts of any kind, monopolies in commodities, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this state, then, in such case, if the attorney-general desires to take the testimony of any officer, director, agent or employe of any corporation or joint stock association proceeded against, or in case of a copartnership, any member of said partnership, or any employe thereof, in any court in which said action may be pending or before any person duly authorized by any court to take testimony in any such action; and the individual or individuals, whose testimony is desired, are without the jurisdiction of the courts of this state, or reside without the state of Missouri, then, in such case, the attorney-general shall file in said court, in term time or in vacation, or with any person duly authorized to take the testimony in such case, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and

the place in the state where he desires the said persons to appear; and, thereupon, the court in which, or one of the judges thereof, or the person before whom testimony is being taken, shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or any agent, officer or employe of any corporation, joint stock association or copartnership which are parties to said action, notifying said attorneys of record, or officer, agent or employe, that the testimony of the person or persons named in the application of the attorney-general is desired, and requiring said attorney or attorneys of record, or said officer, agent or employe, to whom said notice is delivered, or upon whom the same is served, to have said officer, agent, employe or representative of said copartnership or agent thereof, whose evidence it is desired to take at the place named in the application of the attorney-general, and at the time fixed in said application, then and there to testify: *Provided, however,* that the said application shall always allow, in fixing said time, the same number of days for travel to reach the designated point in Missouri that would be now allowed by law in case of taking depositions: *Provided, also,* in addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employe on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice and the return thereon, in writing, may be made by any one authorized by law to serve a subpoena: *Provided,* that no such witness shall be permitted to refuse to produce any books or papers in accordance with an order made under the provisions of this article, or to answer any question in reference to the subject-matter of such litigation, upon the ground that to produce such books and papers, or to answer such questions, would tend to incriminate him or subject him to a penalty or a forfeiture; but no such witness shall be liable to prosecution or subject to an action of penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (R. S. 1899, § 8983, amended, Laws 1907, p. 382.)

Sec. 10330. Proceedings upon failure to testify or to produce books, papers, etc.—Whenever any attorney or attorneys of record, or any agent, officer or employe of any such corporation, joint stock association or copartnership, shall be notified, as above provided, to request any officer, agent, director or employe to attend before any court or before any person authorized to take the testimony in said proceeding, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce whatever books, papers and documents they may be ordered to produce by the court, or the officer authorized to take said evidence, then it shall be the duty of the court, upon the motion of the attorney-general, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by said corporation, joint stock association or copartnership, whose officer, agent, director or employe has neglected or failed to attend and to testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony; and said court shall pro-

ceed to render judgment by default against said corporation, joint stock association or copartnership. (R. S. 1899, § 8984.)

Sec. 10331. Ibid.—And it is further provided, that in case any officer, agent, employe, director or representative of any corporation, joint stock association or copartnership in such proceeding as hereinbefore mentioned, who shall reside or be found within this state, shall be subpoenaed to appear and testify or to produce papers, books and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then or thereafter filed by said corporation, joint stock association or copartnership in any such proceeding shall, on motion of the attorney-general, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership. (R. S. 1899, § 8985.)

ARTICLE V.

TAKING TESTIMONY BEFORE INSTITUTION OF PROCEEDINGS.

SECTION		SECTION	
10332.	Whether action should be commenced determined, how.	10335.	Evidence, to whom delivered—witness not excused from producing records or testifying, when.
10333.	Procedure for securing testimony.	10336.	Power of examiner.
10334.	Order for examination.	10337.	Power to punish for contempt.
		10338.	Costs, how paid.

Sec. 10332. Whether action should be commenced determined, how.—For the purpose of determining whether an action or proceeding should be commenced against any pool, trust, conspiracy or combination in restraint of trade, the attorney-general may examine and procure the testimony of witnesses in the manner herein prescribed. (R. S. 1899, § 8986.)

Sec. 10333. Procedure for securing testimony.—Whenever the attorney-general deems it necessary or proper before beginning any action or proceeding against any pool, trust, conspiracy or combination made, arranged, agreed upon or entered into whereby a monopoly in the manufacture, production or sale in this state of any article or commodity is or may be sought to be created, established or maintained, or whereby competition in this state in the supply or price of any article or commodity is or may be restrained or prevented, then in such case the attorney-general may present to any justice of the supreme court an application, in writing, for an order directing such persons, as the attorney-general may require, to appear before a justice of the supreme court or any examiner designated in said order and answer such relevant and material questions as may be put to them concerning any alleged illegal contract, arrangement, agreement or combination in violation of the laws of this state against pools, trusts, agreements, combinations and conspiracies in restraint of trade, or to regulate, fix or maintain the price of any commodity or to create a

monopoly therein, if it appears to the satisfaction of the justice of the supreme court to whom the application for the order is made that such an order is necessary or expedient, then such order shall be granted. Such order shall be granted without notice, unless notice is required to be given by the justice of the supreme court to whom the application is made, in which event an order to show cause why such application should not be granted shall be made containing such preliminary injunction or stay as may appear to said justice to be proper or expedient, and shall specify the time when and the place where the witnesses are required to appear, and such examination shall be held in the City of Jefferson. The justice of the supreme court or the examiner may adjourn such examination from time to time and witnesses must attend accordingly. (R. S. 1899, § 8987.)

Sec. 10334. Order for examination.—The order for such examination must be signed by the justice making it; and the service of a copy thereof, with an endorsement by the attorney-general signed by him, to the effect that the person named therein is required to appear and be examined at the time and place and before the justice or referee specified in such endorsement, shall be sufficient notice for the attendance of witnesses. Such endorsement may contain a clause requiring such person to produce on such examination all books, papers and documents in his possession or under his control relating to the subject of such examination: *Provided, however,* that the production of books and papers for inspection shall always be subject to the order of the supreme justice who has ordered such examination, and either party may, by a petition, in writing, ask that the said justice pass on the question as to whether or not said books and papers should be produced and examined and introduced in evidence. The order to appear as a witness may be served and return of service made in the same manner and by the same officer by whom a subpoena may now be served. (R. S. 1899, § 8988.)

Sec. 10335. Evidence, to whom delivered—witness not excused from producing records or testifying, when.—The testimony of each witness must be subscribed by him, and all testimony taken by such justice or examiner appointed must be certified and delivered by such justice or examiner to the attorney-general at the close of the examination. The justice or examiner shall cause said testimony to be taken down by a competent stenographer: *Provided,* that no witness shall be permitted to refuse to produce books or papers in accordance with an order made under the provisions of this article, or to answer any questions in reference to the subject-matter of such litigation upon the ground that to produce such books and papers or to answer such questions would tend to incriminate him or subject him to a penalty or a forfeiture; but no such witness shall be liable to prosecution or subject to an action of penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (R. S. 1899, § 8989, amended, Laws 1907, p. 383.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

MALLINCKRODT CHEMICAL WORKS,
Plaintiff in Error,
vs.
THE STATE OF MISSOURI, AT THE RELATION OF SEEBERT G. JONES, CIRCUIT ATTORNEY OF THE CITY OF ST. LOUIS, Defendant in Error.

No. 187.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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23,728

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STATEMENT.

This suit was instituted by the defendant in error in the Circuit Court of the City of St. Louis, against the plaintiff in error, to have the corporate charter, franchises and rights of the plaintiff in error forfeited, because the plaintiff in error had failed, neglected and refused to make and file with the secretary of state for the State of Missouri the anti-trust affidavit, as is required by Sections 10322 and

10323 Revised Statutes of Missouri, 1909, concerning pools, trusts, conspiracies and discriminations.

Upon trial in the state circuit court decree was rendered as prayed for, and, by proper judgment, all charter rights and corporate powers of the plaintiff in error herein were adjudged to be forefited, as is provided in such cases by Section 10322 aforesaid.

In due time the plaintiff in error herein appealed said cause from the state circuit court to the Supreme Court of the State of Missouri, where, upon full hearing, the order, judgment and decree of the state circuit court was, in all things, affirmed. In due time the plaintiff in error herein sued out its writ of error from this court to the Supreme Court of Missouri, and now asks this court to reverse or annul the judgment of the Supreme Court of Missouri in said cause, alleging that by the judgment of the Supreme Court of Missouri certain of its constitutional rights were violated and denied.

THE FACTS.

The facts in this case are few and practically undisputed. Those essential to a determination of this question are as follows:

On September 14, 1910, the Circuit Attorney of the City of St. Louis filed in the circuit court of said city the petition upon which this cause is based. The essential allegations of that petition are as follows:

1st. That the relator, Seebert G. Jones, was the duly elected, qualified and acting circuit attorney for the city of St. Louis, and that the defendant, now plaintiff in error, was, at all the times mentioned in said petition, a business corporation organized and existing under the laws of the State of Missouri, and, as such corporation, it was amenable to the laws of

the State of Missouri, and especially to Chapter 98 R. S. Mo. 1909, entitled, "Pools, trusts, conspiracies and discriminations."

2nd. That on or about the 1st day of July, 1910, the secretary of state for the State of Missouri, in obedience to Section 10322 R. S. Mo. 1909, duly addressed and mailed to the plaintiff in error herein, the defendant below, at its regular and usual place of business in St. Louis, Missouri, a letter of inquiry as to whether the plaintiff in error herein had in any manner entered into or become a party to any trust, combination or association of persons or stockholders, as named in Article I of said chapter, and requiring the plaintiff in error, the defendant below, as such corporation, to make answer under oath to be made by its president, secretary or managing officer, upon the form of affidavit contained in said letter, and being the affidavit required by Section 10322 R. S. Mo. 1909, which is set out at page 7 of the transcript of the record in this cause.

3rd. That thereupon it became the duty of said corporation to make answer to such inquiry and to cause said affidavit to be made, as required by Sections 10322 and 10323, aforesaid, and filed with the secretary of state, as is provided by law and as was required by said letter of inquiry.

4th. That plaintiff in error received said letter of inquiry and received said blank affidavit but failed, neglected, and refused, and still fails, neglects and refuses to make or cause the same to be made or filed in the office of secretary of state, as is required in such cases by law.

5th. That by reason of the premises the plaintiff in error, as a domestic corporation of the State of Missouri, had forfeited its charter and subjected it-

self to the forfeitures and penalties imposed by Sections 10322 and 10327 R. S. Mo. 1909, and prayed judgment accordingly.

The plaintiff in error, defendant below, in due time appeared to a summons which was issued and served as in such cases is provided by law, and first filed its general demurrer (Tr. p. 9). Upon consideration by the court said demurrer was overruled and the plaintiff in error here, defendant below, not desiring to stand upon its demurrer, thereupon in due time filed its answer in said cause (Tr. p. 9). The grounds of defendant's answer is a substantial repetition of the grounds of its demurrer, with the exception that the answer contains a general denial of the allegations of the petition of all matters except the matter of the incorporation of the plaintiff in error.

The testimony in this case shows that the letter of inquiry from the secretary of state for the State of Missouri, together with the anti-trust affidavit, as required by Section 10322 R. S. Mo. 1909, was mailed to the plaintiff in error at its usual place of business in St. Louis about the 15th day of June, 1910 (Tr. pp. 23, 24 and affidavit inserted in transcript following page 24). The annual report of corporations for a domestic corporation was properly filled out on one side of said blank by the plaintiff in error and was mailed to the secretary of state, as was required by Section 3027 R. S. Mo. 1909. But the plaintiff in error refused, failed and neglected to make out the anti-trust affidavit or to make any return, as required by Sections 10322 and 10323 R. S. Mo. 1909.

The failure to make such anti-trust affidavit was not due to oversight or to accident, but was intentionally and determined upon by the plaintiff in error. This clearly appears from the testimony of Oscar L.

Biebinger, who was secretary and manager for the plaintiff in error in this case. At pages 27, 28 and 29 of transcript appears the testimony of this witness on cross-examination. Omitting so much of the transcript as goes merely to technical objections, that testimony is as follows:

Cross-examination by MR. FERRIS:

Q. Did you make out any affidavit as required by the anti-trust law of this State in 1910?

A. Not that I know of; I did not.

Q. You are the officer who signed and subscribed to the annual report which you have referred to, are you not?

A. The report of the corporation, yes.

Q. At that time you did not make out any anti-trust affidavit?

A. No, sir.

* * * * * * * * * *

Q. You made out the annual report which you have referred to on a sheet such as is in evidence here as Exhibit C, on the reverse side of that?

A. Yes, sir.

Q. When you made out that report you saw the blank form on the other side of the blank report including the affidavit, didn't you?

A. Yes, sir.

Q. You went before a notary public—called on a notary public and made affidavit to the report on one side?

* * * * * * * * * *

The Witness: I made the affidavit; yes.

By MR. FERRIS:

Q. You made the affidavit to the report,—you sent it?

A. Yes, sir.

Q. *But you did not make any affidavit as to being in a trust or violating the anti-trust law in this State?*

A. *No, I didn't make the other one.*

Q. *You intended not to make the other one, did you not?*

* * * * * * * * * *

A. *I didn't make it.*

Q. *You failed to do it intentionally, didn't you?*

* * * * * * * * * *

A. *Yes, I omitted it.*

By MR. FERRIS:

Q. *On purpose?*

A. *Yes.*

* * * * * * * * * * *

Q. You have stated that you purposely refrained from filling out and swearing to the affidavit on the reverse side of the report; state what your purpose was in thus refraining from doing it?

* * * * * * * * * *

The WITNESS: *I did not believe we were obliged to answer it.*

* * * * * * * * * *

Q. *For what reason did you think you were not obliged to make the affidavit?*

* * * * * * * * * *

The WITNESS: *I only did it on the general theory that we did not have to make answer to everything asked us.*

* * * * * * * * * *

Q. When you say "We did not think we had to make answer to all these questions" whom do you refer to when you say "we"?

A. I guess myself.

Q. What are your duties as secretary of the corporation?

A. They are generally executive.

Q. You are the person really in the active executive management of the corporation?

A. Very largely in connection with others.

Q. And were so in the year 1910, were you not?

A. Yes, sir.

* * * * * * * * * *

By the COURT:

Q. Did you file any such report?

A. No, sir.

Q. Any affidavit or any sworn statement for the year 1910?

A. So far as I am concerned, no.

By MR. FERRIS:

Q. If any such thing has been done you have not heard of it?

A. No, not for the year 1910.

The issue in this case upon the transcript is plain, simple and clear. It is nowhere suggested by the record that any officer of the plaintiff in error failed to make the affidavit required by the secretary of state of Missouri *because such officer was not sufficiently protected by the immunity clause of Section 10325.* It does not appear to be clear from the record in the

case that the officers or the corporation itself failed to furnish the required affidavit on the ground that the requirement of the state for same was depriving the corporation of its property without process of law, or because the officer making same was not given immunity from prosecution, or because the requirement by the state for said affidavit was a denial to the corporation of the equal protection of the laws, all of which is guaranteed by Section 1 of the 14th amendment to the United States Constitution.

We should notice carefully the record in the case below as to all federal questions which the plaintiff in error now seeks to present to this Court.

> Paragraph 4 of the Answer (Tr. p. 9), is as follows:
>
> "4. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition."

That is the only reference in the Answer to the Federal Constitution. The same reference was contained in the demurrer filed by plaintiff in error and appears as paragraph 5 thereof (Tr. p. 9).

It will be noticed in this connection that no witness or officer of the plaintiff in error has intimated or claimed the benefit of any personal immunity when called upon to make the anti-trust affidavit required by the secretary of state.

The instructions requested by the plaintiff in error of the trial court appear in the transcript at pages 31 and 32.

The only claim presented in said instructions for the benefit of the protection of the federal constitution appears in the second instruction requested by the plaintiff in error herein, the defendant below, and is set out in said instruction as follows:

"II.

"The Court declares the law to be that under the 14th Amendment of the U. S. Constitution, '*No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws,*' and that the rights of defendant under that amendment are infringed and invaded by this action in so far as the same may be intended to punish or to impose any forfeiture on defendant for failure to make such affidavit as is mentioned in section 10322 (Mo. R. S. 1909)."

It will be observed that said instruction limits the claim to the protection afforded the plaintiff in error, the defendant below, to the "*equal protection of the laws*" portion of the 14th Amendment.

In the motion for a new trial filed by the plaintiff in error here, the defendant below, we find paragraphs 14, 16 and 18 referring to claims based on some provisions of the federal Constitution. Those paragraphs are as follows:

"14. The finding of the Court is erroneous because in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."

"16. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the United States, in that it deprives defendant of property *without due process of law*, contrary to the 14th Amendment to said Constitution."

"18. The Court erred in finding for plaintiff and thereby denying to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States.

In the motion for arrest of judgment, paragraphs 8, 10 and 12 it claims rights arising under the federal Constitutoin. Those paragraphs are as follows:

"8. The finding and verdict of the Court are insufficient to support any judgment because same are in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."

"10. The finding and verdict of the Court are insufficient to support any judgment because same disregard rights of defendant under the Constitution of the United States, in that same deprive defendant of property *without due process of law*, contrary to the 14th Amendment of said Constitution."

"12. The finding and verdict of the Court are insufficient to support any judgment because same deny to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States."

Under this state of the record, the case was presented to the Supreme Court of Missouri, together with questions purely local in their character, and the Supreme Court of Missouri affirmed the judgment below and wrote an opinion upon the law of the case,

as appears from the transcript at pages 41 to 62, both inclusive, now reported in Vol. 249, Mo., 702.

It will be noticed that the opinion was by the Court in Banc, to which all agreed save Judge BOND, who dissented on the ground that the Supreme Court of Missouri had power to permit the filing of the affidavit at that time and to avoid the judgment of forfeiture.

The essential question that will be considered by this Court will be only those questions which give rise to the rights claimed by plaintiff in error, arising under the Federal Constitution or its amendments.

In this connection it will be noticed that neither the demurrer nor the answer state specifically any grounds of the Federal Constitution has been violated by the proceedings in this case, so far as the rights of plaintiff in error are concerned. Instruction No. 2 presents the question of the equal protection of the laws. If the answer and demurrer are sufficient to raise any question for the consideration of the trial court, then those questions are limited by the specific question raised in the second instruction. (Tr. p. 31.)

In this connection we desire to call to the attention of the court the grounds assigned by plaintiff in error for a rehearing of this cause in the Supreme Court of Missouri. (Tr. pp. 63-68.)

The 3d assignment in that motion is as follows (Tr. p. 65):

> "3. The result of the judgment of affirmance deprives appellant of the *equal protection of the laws*, and hence is an infringement of its rights secured by the 14th amendment to the Federal Constitution."

The 4th assignment in that motion is as follows (Tr. p. 66):

> "4. The court inadvertently omitted to notice the assignment of error by appellant in which it is claimed that the affidavit required by the statute is not '*due process of law*' because it demands a sworn statement that the defendant 'does not own any trust certificates.' "

No other right of plaintiff in error, arising under the federal Constitution, is claimed by the motion for a re-hearing.

The 4th ground of that motion is based on the "due process of law" clause, of section 1, 14th Amendment. The plaintiff in error frankly says under this ground that the court has not considered the specific assignment which it has made, and requests the court to reconsider the cause upon that specification. Therefore, due process of law is not involved in the record now under consideration of this court.

It will be noticed that the plaintiff in error does not complain of any violation of the immunity clause of section 1 of the 14th Amendment to the federal Constitution in its motion for a re-hearing filed in the Supreme Court of Missouri. Not being raised in motion for a re-hearing, and not otherwise being preserved upon the record, it is not now before this court for determination.

In closing this statement of the facts, we respectfully submit that the plaintiff in error has not preserved or presented a federal question or a right arising under the federal Constitution, or the Amendments thereto, with sufficient certainty or definiteness to raise, properly speaking, a federal question, or, if

raised, it is of such a nature as has been repeatedly passed upon by this court and decided adversely to the contention of plaintiff in error, so that the writ of error in this case should either be dismissed or the judgment affirmed; and further the decision of the Supreme Court of Missouri conclusively disposed of the appeal without reviewing the constitutional question discussed by it.

We shall further refer to these propositions; and in doing so we shall respectfully request the judgment of this court to affirm the judgment of the Supreme Court of Missouri.

ASSIGNMENTS OF ERRORS.

The plaintiff in error, in its brief, has discussed many questions. At page 2 of their statement and brief we find only two assignments of errors set out by the plaintiff in error. They are as follows:

The law requiring the managing officers of the defendant corporation to make and file the affidavit of innocence is claimed to infringe the rights and immunities of plaintiff in error and of those individuals who are its officers (and have a property right in its franchises) under the 14th Amendment to the federal Constitution:

1st. By denying to defendant and its managing officers the "*equal protection of the laws*;" and

2nd. By depriving defendant and its officers of its franchises (property) "*without due process of law.*"

POINTS AND AUTHORITIES.

I.

Only federal questions will be considered by this court in reviewing judgments of a state court.

Waters Pierce Oil Co. v. Texas, 212 U. S. 86, l. c. 112;

Chicago Ins. Co. v. Needles, 113 U. S. 574, 581-2;

Barbier v. Connelly, 113 U. S., 27-32;

Armour Pkg. Co. v. Lacy, 200 U. S. 226, l. c. 236.

II.

Whether a state statute is repugnant to the state Constitution, does not present a federal question; the decision of such question belongs wholly to the state court, and its decision is binding on this court.

In Re Kemmler, 136 U. S. 436, l. c. 447;

Rassmussen v. Ida, 181 U. S. 198, l. c. 200;

Merchants Bank v. Pa. 167 U. S. 461, l. c. 462;

Layton v. Missouri, 187 U. S. 356, l. c. 361;

Morley v. Lake Shore Ry. Co., 146 U. S. 162, l. c. 167.

III.

The proper construction to be given a state statute and the determination of its terms is a matter for the state courts and presents no federal question. This court will be bound by the interpretation, application and scope of a state statute, given by the state court of last resort.

Louisiana v. Pelsbury, 105 U. S. 278, l. c. 294;

Phoenix Ins. Co. v. Gardner, 11 Wall. 204;

Morley v. Lake Shore Co., 146 U. S. 162, l. c. 166-7;

Standard Oil Co. v. Tenn., 217 U. S. 413;

Smiley v. Kans., 196 U. S. 447, l. c. 454;

Waters-Pierce Oil Co. v. Tex., 177 U. S. 28, l. c. 42;

Cargill Co. v. Minn., 180 U. S. 452, l. c. 466-7;

International Harvester Co. v. Missouri, 173 U. S. 99, l. c. 107;

Hartford Ins. Co. v. R. R. Co., 175 U. S. 91, l. c. 100;

Town of Enfield v. Jordon, 119 U. S. 680;

International Harvester Co. v. Mo., 234 U. S. 199;

Hammond Pkg. Co. v. Ark., 212 U. S. l. c. 343.

IV.

This court will accept as conclusive the findings of fact made by the state court in this case, and will also accept the finding that such facts constituted a violation of the law as construed by the state court of last resort.

Waters-Pierce Oil Co. v. Tex., 212 U. S. 86, l. c. 97 and 106;

Thayer v. Spratt, 189 U. S. 346, l. c. 353;

Egan v. Hart, 165 U. S. 188, l. c. 189;

Smiley v. Kans., 196 U. S. 447, l. c. 454;

Gardner v. Bonesteel, 180 U. S. 162;

Christman v. Miller, 197 U. S. 313;

Chapman v. Bigelow, 206 U. S. 41, l. c. 44-5.

V.

The authority of the General Assembly of the State of Missouri to pass laws prohibiting agreements or combinations in restraint of trade, or the carrying out in the state of such agreements or combinations, is absolute and complete.

International Harvester Co. v. Mo., 234 U. S. 199, l. c. 210-212, 214-215;

Berea College v. Ky., 211 U. S. 45, l. c. 53, 54;

Waters-Pierce Oil Co. v. Tex., 212 U. S. 86;

Waters-Pierce Oil Co. v. Tex., 177 U. S. 28;

Standard Oil Co. v. Tenn. 217 U. S. 415;

Nat'l Cotton Oil Co. v. Tex., 197 U. S. 115;

Smiley v. Kans., 196 U. S. 447;

Carroll v. Greenwich Ins. Co., 199 U. S. 410.

VI.

The State of Missouri has the absolute right and power to prescribe punishment for violations of her antitrust laws.

International Harvester Co. v. Missouri, 234 U. S. 199;

Waters-Pierce Oil Co. v. Tex., 212 U. S. 86, l. c. 111;

Coffey v. Harlan Co., 204 U. S. 659;

Nat'l Cotton Oil Co. v. Tex., 197 U. S. 115;

Repley v. Tex., 193 U. S. 504;

Ohio v. Lloyd, 194 U. S. 445;

Marvin v. Trout, 199 U. S. 212;

Ry. Co. v. Hume, 115 U. S. 512;

Tel. Co. v. Ind., 165 U. S. 304;

Standard Oil Co. v. Mo. 224 U. S.

VII.

"When a state court decides a case upon two grounds—one federal and one non-federal, this court will not disturb the judgment if the non-federal ground, fairly construed, sustains the decision."

Berea College v. Ky., 211 U. S. 45, l. c. 53; Citing

Murdock v. City of Memphis, 20 Wall. 590, l. c. 636;

Eustis v. Bolles, 150 U. S. 301;

Giles v. Teasley, 193 U. S. 146, l. c. 160;

Allen v. Arguimbau, 198 U. S. 149.

VIII.

The presumption is always in favor of the validity of a state statute.

Railroad Co. v. May, 194 U. S. 267, l. c. 269;

Erb v. Marasch, 177 U. S. 584, l. c. 586;

Fisher v. St. Louis, 194 U. S. 361, l. c. 371;

Railroad Co. v. Richmond, 96 U. S. 521, l. c. 529.

IX.

Before a state statute will be annulled by the U. S. Supreme Court as arbitrary or unreasonable and, therefore, in violation of the federal Constitution, or of the amendments thereto, it must clearly appear to be in violation thereof.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, l. c. 411;

International Harvester Co. v. Mo., 234 U. S. 199, l. c. 210 and 214;

Bachtel v. Wilson, 204 U. S., l. c. 36, 37, 41 and 42;

See cases cited under point 8.

X.

The state has extremely wide latitude and great power in providing classes which may be subject to

legislative enactment, regulation or control, and discretion, when exercised by a state in such matters, will be enforced unless the enforcement thereof would be extremely unjust and clearly in violation of some provision of the federal Constitution. Such classification may, within certain degrees, discriminate to great length and still be valid under the federal Constitution.

International Harvester Co. v. Mo., 234 U. S. 199, l. c. 210;

Standard Oil Co. v. Tenn., 217 U. S.,—l. c. 420;

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96, l. c. 106 and 107;

Hammond Pkg. Co. v. Ark., 212 U. S.—, l. c. 343;

Clark v. K. C., 176 U. S. 114, l. c. 120;

Home Tel. Co. v. Los Angeles, 211 U. S. 265, l. c. 277.

XI.

The immunity clause of the 14th amendment to the Federal Constitution is purely personal; it has been held that an attorney cannot raise the question for the witness.

Hale v. Henkel, 201 Mo. 43, l. c. 70;

Brown v. Walker 161 U. S. 596;

Best on Evidence (9th. Ed.) p. 113;

3 Taylor on Evidence, Sec. 1453;

1 Greenleaf on Evidence (16th. Ed.), Sec. 469d;

Philips on Evidence (4th. Am. Ed.), p. 935;
Starkie on Evidence (10th. Am. Ed.) p. 4;
Wigmore on Evidence Sec. 2263;
Com. v. Shaw, 4 Cush. 594;
State v. Wentworth, 65 Maine 234-241.

XII.

The Supreme Court of Missouri has approved all questions of procedure in the case at bar.

State ex rel. Jones, Circuit Attorney, v. Mallinckrodt Chemical Works, 249 Mo. 702;
Tex. & N. O. R. R. Co. v. Miller, 221 U. S. 408, l. c. 416.

If the decision of the Missouri Supreme Court has accorded plaintiff in error every right, benefit and privilege guaranteed to it by the United States Constitution, then the judgment must be affirmed by this court.

Berea College v. Ky., 211 U. S. 45, l. c. 53, 54.

XIII.

"The equal protection of the law" as guaranteed by the 14th Amendment to the federal Constitution is satisfied if the law applies equally to all persons in like situation and conditions.

Chicago, etc., R. Co. v. Ia. 94 U. S. 155, l. c. 163;
International Harvester Co. v. Mo. 234 U. S. 199, l. c. 210-214;
Duncan v. Mo., 152 U. S. 382;

German Alliance Ins. Co. v. Hale, 219 U. S. 307;

Williams v. Ark., 217 U. S. 79;

Mutual Loan Co. v. Martel, 222 U. S. 225, l. c. 233, 236;

Aluminum Co. v. Rumsey, 222 U. S. 251, l. c. 255.

XIV.

"Due process of law" has been given the plaintiff in error under the Missouri statutes and the proceedings involved in the case at bar as fully as is guaranteed to it by the federal Constitution; it has been given its day in court after due notice.

Hammond Pkg. Co. v. Arkansas, 212 U. S. 322, l. c. 350;

N. & S. Turnpike Co. v. Virginia, 225 U. S. 264, 270-1;

Twining v. New Jersey 211, U. S. 79;

Standard Oil Co. v. Missouri 224 U. S. 270;

Jordan v. Commonwealth, 225 U. S. 167;

Jacob v. Roberts, 223 U. S. 261;

American Land Co. v. Zeiss, 219 U. S. 47;

Paddell v. New York, 211 U. S. 446, 450;

Blinn v. Nelson, 222 U. S. 1.

XV.

No provision of the federal Constitution is violated by the Missouri statute, which requires an affidavit of innocence to be furnished by all domestic corporations in Missouri when such affidavit is not required by

persons or partnerships engaged in the same or similar lines of business with such corporations.

Mutual Loan Co. v. Martel, 222 U. S. 225, l. c. 233, 236;

International Harvester Co. v. Mo., 234 U. S. 199, l. c. 210, 214;

Berea College v. Ky., 211 U. S. 45, l. c. 53, 54;

Hammond Pkg. Co. v. Ark., 212 U. S. 322, l. c. 343, 344;

German Alliance Ins. Co. v. Hale, 219 U. S. 307, l. c. 219.

XVI.

The Supreme Court of Missouri, on appeal, is confined to the matters presented in the first instance to the lower court, and also to the theory of the case as presented to the lower court.

Ice & Coal Storage Co. v. Kuhlmann, 238 Mo. 685, 705;

State ex rel. McQuillin, 246 Mo. 586, 592;

Dougherty v. Dougherty, 239 Mo. 649, 659 Pt. III.

A constitutional question which may have been raised by demurrer or answer, and not so raised, but presented to the lower court for the first time by motion in arrest is raised out of time and does not confer jurisdiction on the Supreme Court.

Dubowsky v. Binggeli, 258 Mo. 197, 202;

Howell v. Sherwood, 242 Mo. 513.

ARGUMENT.

Before attempting to discuss the merits of some of the questions presented by the plaintiff in error, we desire to call the attention of the court to the record in this case and insist that the record does not justify this court in exercising its jurisdiction to determine the merits of the questions involved in this cause.

In the demurrer filed by plaintiff in error (Tr. p. 9), under paragraph five we find the following language:

> "5. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition."

The demurrer was overruled by the court (Tr. p. 9). Whereupon the plaintiff in error filed its answer, the 4th paragraph of which being the only reference therein to the federal Constitution, is as follows:

> "4. This defendant cites the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition."

We respectfully submit that the allegations above quoted are wholly insufficient to raise a federal question on behalf of plaintiff in error. The specification in both the answer and the demurrer is so broad, so indefinite and so uncertain that the trial court could not be advised as to just what the plaintiff in error

relied upon for its protection. We respectfully submit that the specification is so broad, indefinite, uncertain and general that neither the Supreme Court of Missouri nor this Court should assume jurisdiction to decide the questions which the plaintiff in error now endeavors to bring before this Court.

In the motion for a new trial, in paragraphs 14, 16 and 18, plaintiff in error urges that the trial court by its decision had violated certain of its rights which it is entitled to have under the federal Constitution. Those specifications are as follows:

> "14. The finding of the Court is erroneous because in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."
>
> "16. The finding of the Court is erroneous because its disregards rights of defendant under the Constitution of the United States, in that it deprives defendant of property without due process of law, contrary to the 14th Amendment to said Constitution."
>
> "18. The Court erred in finding for plaintiff and thereby denying to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the Unites States."

In the motion in arrest filed by plaintiff in error, in paragraphs 8, 10 and 12 we have a repetition of the paragraphs numbered 14, 16 and 18 in its motion for a new trial (Tr. p. 33, 34, 35).

The 14th and 18th paragraphs in the motion for a new trial and the 8th and the 12th in the motion

in arrest are so indefinite and uncertain that the court was not advised as to what right or immunity the plaintiff in error relied upon by those specifications, unless we applied the usual rule of construction, which requires that in case general terms are used in a document followed by specific terms, then the general terms so used must yield to the specific terms which are used in connection with the general terms. If this rule were applied in this case, then we have but one federal question presented upon the motion for a new trial and the motion in arrest of judgment. That is found in paragraph 16 of the motion for a new trial, and is as follows:

> "16. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the United States, in that it *deprives defendant of property without due process of law*, contrary to the 14th Amendment to said Constitution."

This paragraph is similar to paragraph 10 in the motion in arrest of judgment (Tr. p. 34). Here plaintiff in error relies exclusively upon the provision of Section 1 of the 14th Amendment to the federal Constitution, relating to the *due process of law* clause of that section. We do not know whether this is the same clause or portion of the 14th Amendment which the pleader had in mind when the demurrer and answer were filed in this case. The instruction requested by the plaintiff in error, attempted to raise only the equal protection of the laws clause and did not raise the "*due process of law*" clause.

We suggest these references to the transcript to show that there is not one federal question which the

plaintiff in error has raised with any certainty in the proceedinsn g ithe state courts.

B.

It is true that the Missouri Supreme Court in its opinion referred to several matters of a federal nature namely to the *due process of law* provision, to *the equel protection of the laws* clause in Section 1, 14th Amendment, and to the provision in the 14th Amendment which provides *that no person shall be compelled to testify against himself.* These questions were not presented to the Supreme Court of Missouri by the record produced in this cause, which is now brought here by the plaintiff in error. We, therefore, maintain that so much of the discussion of the law of this case as appears in the opinion of the Supreme Court of Missouri in reference to these matters are purely obiter, and those references in the opinions not having foundation in the record before the court are not sufficient to raise a federal question on which the plaintiff in error can be heard in this Court. We, therefore, suggest that no question is preserved by the record and transcript, when given a reasonable interpretation. The *due process of law* question presented in paragraph 16 of the motion for a new trial and paragraph 10 in the motion in arrest of judgment, was not presented in the answer or by the instructions. The question of the "*equal protection of the laws*" was not presented in the answer nor in the motion for a new trial or in the motion in arrest of judgment.

The serious question that we present now upon the record in this case is this: Conceding that the plaintiff in error now presents a federal question based upon the "*due process of law*" or the "*equal protection of the laws*" clauses of the 14th Amendment, did he raise those

questions timely in the court below, namely, in his answer, and keep them alive in its motions for a new trial and in arrest of judgment? The answer, inasmuch as the demurrer was waived, should have embodied his federal questions. The specification there, we insist, is entirely too indefinite and uncertain to present or preserve a federal question for the review of this Court. If the question should have been presented and preserved in the first instance by the answer or the demurrer, and if the answer or demurrer fails to preserve that question with sufficient certainty and precision to present the same to the Missouri Supreme Court or to this Court, then we respectfully submit that there is no federal question preserved in the transcript upon which this Court may exercise its jurisdiction.

As illustrating the doctrine above, we beg to call the attention of the court to the case of Thomas v. Iowa, 209 U. S. 258, where Mr. Justice Moody, in speaking for this Court, at page 263, says:

> "The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here. *Haire* v. *Rice*, 204 U. S. 291. All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they 'in effect deprive the plaintiff in error of his liberty without due process of law;' and that the question thus raised was discussed before the Supreme Court of the State. But something more than this vague and inferential sug-

> gestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments, which exists under the Constitution and is regulated by Sec. 709 of the Revised Statutes. A mere claim in the court below, that there has been a denial of due process of law, does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution. See *Clarke* v. *McDade*, 165 U. S. 168, 172; Miller v. Cornwall Railroad Company, 168 U. S. 131, 134; Harding v. Illinois, 196 U. S. 78, 88."

The doctrine is further emphasized in First National Bank v. Esterville, 215 U. S. 341, where Mr. Chief Justice Fuller, in speaking for this Court, at page 346, said:

> "We are met at the threshold by a motion to dismiss for want of jurisdiction. It was ruled in *Tyler* v. *Judges of Registration*, 179 U. S. 405, 408, that although 'it is true that under the third clause of Sec. 709, Rev. Stat., where a title, right, privilege, or immunity is claimed under Federal law, such title, etc., must be 'specially set up or claimed' and that no such provision is made as to cases within the second clause, involving the constitutionality of state statutes or authorities, but it is none the less true that the authority of such statute must 'be drawn in

> question' by some one who has been affected by the decision of the state court in favor of its validity, and that in this aprticular the three clauses of the section are practically identical.'
>
> "In order to give this court jurisdiction of a writ of error to the highest court of a State in which a decision could be had it must appear affirmatively that a Federal question was presented for decision, *that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment rendered could not have been given without deciding it.*"

In order to preserve and present a constitutional question for the determination of the Supreme Court of Missouri it is necessary that the specific question be presented to the trial court and the ruling of the trial court thereon be properly preserved, so that the Supreme Court of Missouri may have the adverse ruling, with the exceptions thereto, before it for consideration. These steps are necessary in order to preserve a constitutional question for the consideration and determination of the Supreme Court of Missouri. This rule is clearly emphasized in the case of Layton v. Mo., 187 U. S. 356, where this court, in speaking through Mr. Chief Justice Fuller, at page 361, said:

> "And it has been repeatedly laid down by the Supreme Court of Missouri in disposing of questions of jurisdiction as between itself and intermediate courts of appeal that: '*The appellate jurisdiction of the Supreme Court contemplates a review only of the matters*

> *submitted to, and examined and determined by the trial court.* Hence it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court'. *Browning* v. *Powers*, 142 Missouri, 322; *Bennett* v. *Railway Co.*, 105 Missouri, 645; *Shewalter* v. *Railway Company*, 152 Missouri, 551.
>
> "As we observed in *Jacobi's* case, p. 133, *ante*, we cannot interfere with the action of the highest court of the State in adhearing to the usual course of its judgments, and we have frequently ruled that this court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the Constitution of the United States has been adjudged where those courts 'did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice.' *Erie Railroad Company v. Purdy*, 185 U. S. 148, 154."

In support of this proposition we beg to call the attention of the court to the ruling of the Supreme Court of Missouri as found in cases quoted under point 16.

In Dougherty v. Gangloff, 239 Mo. 649, the Supreme Court of Missouri, in speaking through KENNISH, P. J., at page 660, stated the rule thus:

> "It is sufficient to say upon this point that no such issue was raised in the trial court. It has long been an established rule of appellate procedure in this State that a

litigant is bound by the theory upon which he tries his case in the lower court. He cannot 'try his cause on one theory in the trial court, and then, if beaten there on ground of his own choosing, spring a fresh theory on his adversary in this court.' (Bray's Adm'r v. Seligman's Adm'r, 75 Mo. l. c. 40; Henry County v. Citizens Bank, 208 Mo. l. c. 226.)"

In State ex rel. v. McQuillin, 246 Mo. 586, the Supreme Court of Missouri, in speaking through BROWN, J., at page 592, stated the rule thus:

"A constitutional question cannot legally be injected into a cause appealed from the probate court, where no such issue was presented at the trial in such court.

"A very similar question was presented to us in In re Storm's Estate, 213 Mo. 1. and in that case, this court speaking through GANTT, J., said:

" 'It is elemental in this State that on appeal from a probate court or a justice of the peace, the circuit court must try the case anew upon the same cause of action that was tried in the probate court or in the justice's court. It is obvious that the two constitutional questions imported into the case presented entirely new issues in the circuit court, issues which the probate court was not allowed to pass on, and this change of the cause of action, so to speak, was unauthorized. The appeal could not give the circuit court greater jurisdiction than the probate court had, or change the course of that appeal

from the St. Louis Court of Appeals to this court.' "

In Dubowsky v. Binggeli, 258 Mo. 197, the Supreme Court of Missouri, in speaking through BROWN, J., at l. c. 200, said:

> "I. No motion has been filed to transfer this cause to the Kansas City Court of Appeals, but the Constitution having defined our jurisdiction, as well as the jurisdiction of the courts of appeals, it is our duty to ascertain whether we have jurisdiction before considering the case upon its merits. (May v. Mortgage Trust Co., 138 Mo. 447, l. c. 449; Cable v. Duke, 208 Mo. 557; Ferguson v. Comfort, 159 Mo. App. 30.) This court will not permit parties to confer jurisdiction upon it by stipulation or acquiescence. (Vandeventer v. Bank, 232 Mo. 618.)"

And also at pages 201 and 202 said:

> "We have not overlooked the fact that defendant's learned counsel, in his motion in arrest, asserts that by the judgment in this cause the defendants are deprived of their property without due process of law, as prohibited by article 2, section 30, Constitution of Missouri. On this point it is only necessary to say that if to permit the plaintiff to sue and recover judgment upon a note and deed of trust in which she was not specifically named as the payee or beneficiary deprives defendants of their property without due process of law, that

> defense could have been raised by demurrer or answer, and as it was not raised until the motion in arrest was filed, such issue was presented out of time and must be disregarded. (Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685; State v. Gamma, 215 Mo. 100; Hartzler v. Met. Street Ry. Co., 218 Mo. 562; Howell v. Sherwood, 242 Mo. 513.)"

In Ice & Cold Storage Co. v. Kuhlmann, 238 Mo. 685, LAMB, J., in speaking for the court, at page 705, said:

> "But we do not decide the question. The point now made was not made below. The point made below is not made here. Such mending of holds, and swaps of position will not do."

We respectfully submit upon the record in this case, that no federal question was preserved in the record in the case at bar with that clearness and certainty, which is required in such cases. The federal questions which plaintiff in error seeks to present to this Court in its brief have no proper foundation for their existence in the record. Without such foundation they are not preserved for the consideration of this Court, and were not properly preserved for consideration of the Supreme Court of Missouri, and therefore its discussion of them was *obiter* and were not necessary for that court's decision upon the record before it. The writ of error in this cause should be dismissed or the judgment of the Supreme Court of Missouri be affirmed.

With these preliminary observations, without

waiving the foregoing matters we will pass to the several points raised by the plaintiff in error.

I.

Plaintiff in error, at page 71 of the transcript, sets out six assignments of error. The first and second assignments may be treated as one. They are as follows:

> "1st Assignment of Error.
>
> "The said Supreme Court of Missouri erred in affirming the judgment of the Circuit Court, City of St. Louis, in that said affirmance denies to said appellant (plaintiff in error) rights, privileges and immunities claimed by it under the Constitution of the United States:
>
> "2nd. Assignment of Error.
>
> "The said Supreme Court erred in not reversing the judgment of the Circuit Court, City of St. Louis, in said cause, thereby denying to said appellant (plaintiff in error) rights, privileges and immunities claimed by it under the Constitution of the United States."

We respectfully submit that under the authorities heretofore cited these assignments are so indefinite and uncertain as to present no federal question whatever for the consideration of this Court. No foundation was laid for these assignments in the trial court as is necessary in order to preserve them for the consideration of this Court on a writ of error.

II.

The 3rd, 4th and 6th assignments of error are based upon the proposition that the plaintiff in error was denied the "*equal protection of the laws*" in the proceedings at bar. Those assignments are as follows:

> "3rd Assignment of Error.
>
> "The said Supreme Court erred in denying appellant (plaintiff in error) the equal *protection of the laws* under the Constitution of the United States (14th Amendment thereto) by entering judgment of forfeiture and thereby disregarding the rights, privileges and immunities of appellant (plaintiff in error) and of each of its managing officers, under the Constitution of the United States (14th Amendment thereto);"
>
> "4th Assignment of Error.
>
> "The said Supreme Court erred in affirming the judgment of the Circuit Court, City of St. Louis, in said cause, which refused a peremptory instruction for defendant and thereby denied to said defendant (appellant and plaintiff in error) and to its officers the *equal protection of the laws guaranteed to them* by the 14th Amendment to the Constitution of the United States, in that it is unreasonable and oppressive to require corporate officers to make such affidavit and yet to leave every 'partnership, individual or association of individuals' (also within the Missouri law against monopolies, secs. 10299, 10303) in the same situation and circum-

stances, immune from such requirement; and in affirming judgment of the said Circuit Court to that effect, said Supreme Court denied to appellant (plaintiff in error) rights, privileges, and immunities claimed by it, under the Constitution of the United States (14th Amendment thereto)."

"6th Assignment of Error.

"The said Circuit Court, City of St. Louis, erred in entering judgment of forfeiture against relator, under sec. 10322 (R. S. Mo., 1909) which statute violates rights and privileges of appellant (plaintiff in error) *to the equal protection of the laws*, under the 14th Amendment to the Constitution of the United States; and the Supreme Court likewise erred in affirming said circuit judgment, and thereby producing the same result."

The 3rd and 6th assignments, it will be noticed, are but variations of the 4th assignment. The fundamental basis of the complaint is that the anti-trust laws of Missouri require corporation to make the affidavit of innocence, as is required by Sections 10322, and 10333 R. S. Mo. 1909, and such requirement is not made of individuals, partnerships or associations of individuals, and, for that reason, the plaintiff in error says it is denied *due process of law*, inasmuch as it, a Missouri corporation, is thereby required to make the affidavit of innocence and the others mentioned are not required to make such affidavit. We respectfully submit that the law on this question is clearly settled, both in the jurisdiction of the State of Missouri and by this Court.

The General Assembly of Missouri, acting under the Constitution of Missouri and within its provisions, has seen fit to classify all persons, corporations or associations coming under the general application of the anti-trust laws of Missouri and to require that all corporations created by the laws of Missouri to make and file the anti-trust affidavit mentioned in Section 10322 R. S. Mo. 1909, which the plaintiff in error refused to make or file. The power to make such classification was a legitimate exercise of the powers of the General Assembly of Missouri, within the provisions of the federal Constitution. This question has many times received consideration by this court. We now briefly call to the attention of the Court a few of the many cases on this point.

In International Harvester Co. v. Mo., 234 U. S. 199, this Court, in speaking through Mr. Justice McKenna, at pages 210-212, said:

> "(2) and (3). These contentions may be considered together, both involving a charge of discrimination—the one because the law does not embrace vendors of labor, the other because it does not cover purchases of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in *Atchison, Topeka & Sante Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 106, by Mr. Justice Brewer, 'The very idea of classification is that of inequality, so that it does without saying that the fact of inequality in no manner

determines the matter of constitutionality.' Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine.

"In *Carroll v. Greenwich Ins. Co., supra,* a statute of Iowa was considered which made it unlawful for two or more fire insurance companies doing business in the State, or their officers or agents, to make or enter into combinations or agreements in relation to the rates to be charged for insurance and certain other matters. The provision was held invalid by the Circuit Court of the United States for the District of Iowa on the ground of depriving of liberty of contract secured by the Fourteenth Amendment and of the equal protection of the laws. This court reversed the decision, saying, after stating that there was a general statute of Iowa which prohibited combinations to fix the price of any article of merchandise or commodity or to limit the quantity of the same produced or sold in the State, 'Therefore the act in question does little if anything more than apply and work out the policy of

the general law in a particular case.' Again, 'If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms.' And 'If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what the legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Company v. Metter*, 185 U. S. 308.' (199 U. S. p. 411.) Other cases were also cited in illustration.

"*Carroll v. Greenwich Ins. Co., supra,* is expecially apposite. It contains the elements of the case at bar and a decision upon them. It will be observed that the statute, which it was said declared the general policy of Iowa, was a prohibition against a combination of producers and sellers. There was the same distinction, therefore, between vendors and purchasers of commodities as in the Missouri statute and the same omission of prohibition of combinations of vendors of labor and services as in the Missouri law. The distinction and omission were continued when the policy of the State was extended to insurance companies. The law was not condemned because it went no farther—because

it did not prohibit the combination of all trades, businesses and persons. We held that the omission was not for judicial cognizance, and that a court could not say that fire insurance might not present so conspicuous an example of what the legislature might think an evil 'as to justify special treatment.' "

And also at pages 214 and 215 said:

"The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the 'basis of community.' We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U. S. 267, 269; *Williams v. Arkansas*, 217 U. S. 79, 90; *Watson v. Maryland* 218 U. S. 173, 179.

"The instance of these cases are instructive. In the first there was a difference made between land onwers as to liability for permitting certain noxious grasses to go to seed on the lands. In the second, the statute passed on made a difference between businesses in the solicitation of patronage on railroad trains and at depots. In the third a difference based on the evidence of qualification of physicians was declared valid.

"In *Western Union Telegraph Co. v. Milling Co.*, 218 U. S. 406, a distinction was made between common carriers in the power to limit liability for negligence. In *Engel* v. *O'Malley, supra*, a distinction between bankers was sustained; and in *Provident Savings Institution v. Malone*, 221 U. S. 660, deposits in savings banks were distinguished from deposits in other banks in the application of the statute of limitations.

"Other cases might be cited whose instances illustrate the same principle and in which this court has refused to accept the higher generalizations urged as necessary to the fulfillment of the constitutional guaranty of the equal protection of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances. Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. *Magoun v. Illinois Trust &c. Bank*, 170 U. S. 283; *Clark* v. *Kansas City*, 176 U. S. 114; *Gundling* v. *Chicago*, 177 U. S. 183; *Petit* v. *Minnesota*, 177 U. S. 164; *Williams* v. *Fears*, 179 U. S. 270; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Griffith* v. *Connecticut*, 218 U. S. 563; *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, 466; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79; *Fifth Avenue Coach Co.* v. *New York*, 221 U. S.

467; *Murphy* v. *California*, 225 U. S. 623; *Rosenthal* v. *New York*, *York*, 226 U. S. 260, 269, 270; *Mo., Kan. &. Tex. Ry.* v. *Cade*, 233 U. S. 642."

This precise question was carefully considered by this court in the case of *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, in speaking through Mr. Justice White at pages 343 and 344, said:

> "Although it be conceded that the provisions of the statute cannot consistently with constitutional limitations be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations furnished a distinction authorizing a classification between the two. It is apparent that the court below, both in the *Hartford case* and in this, by a construction which is here binding, treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations."

In Berea College v. Ky., 211 U. S. 45, Mr. Justice Brewer in speaking for this court at pages 53 and 54, said:

"Upon this we remark that when a state court decides a case upon two grounds, one federal and the other non-federal, this court will not disturb the judgment if the non-federal ground, fairly construed, sustains the decision. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636; *Eustis* v. *Bolles*, 150 U. S. 361; *Giles* v. *Teasley*, 193 U. S. 146, 160; *Allen* v. *Arguimbau*, 198 U. S. 149.

"Again, the decision by a state court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction, it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.' *Home Ins. Co.* v. *New York*, 134 U. S. 594, 600; *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9. How. 172, 184; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305-312. The act of 1904 forbids 'any person, corporation or association of persons to maintain or operate any college,'

> etc. Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State."

In *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, l. c. 319, this court in speaking through Mr. Justice Harlan, said:

> "Statutes that apply equally to all of the same class and under like conditions cannot be held to deny the equal protection of the laws; for, as this court has adjudged, 'the equal protection of the laws is a pledge of the protection of equal laws' to all under like circumstances. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 367; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703."

In *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, this court in speaking through Mr. Justice McKenna at page 233 used the following comprehensive language:

> "In a sense, the police power is but another name for the power of government, and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the State, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And with-

> in that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it, and this test was applied by the Supreme Judicial Court of Massachusetts in passing on the validity of the statute under review."

And also at page 236 said:

> "But even if some degree of evil which the statute was intended to pervent could be ascribed to loans made by the exempted institutions, their exemption would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provision of the Fourteenth Amendment to the Constitution of the United States. *Ozan Lumber Co. v. Union Bank*, 207 U. S. 251; *Heath & Milligan Co.* v. *Worst*, Id. 338."

Upon the authority of the foregoing cases from which we have quoted, as well as upon the authorities cited by those cases, we respectfully submit that the plaintiff in error has not been denied the equal protection of the laws, guaranteed to it by the federal Constitution, in that it, as a corporation of Missouri, has been required by the statutes of Missouri to make and file the anti-trust affidavit, as required by Sections 10322-3 thereof. This point, we respectfully submit, must be ruled against the contention of the plaintiff in error. It has been accorded every privilege which the laws of Missouri grant to domestic corporations. The State of Missouri had the right to require the anti-trust

affidavit of its corporations. It is elementary that a corporation has no constitutional right to exist as a corporation except within the limitations, for the purposes, and as provided by law. The laws of Missouri provide for the creation of domestic corporations for business and manufacturing purposes, to which class plaintiff in error belongs. As a part of the charter powers of the plaintiff in error, as such corporation of Missouri, it has agreed in substance as one of the conditions upon which it exercises its franchises and powers that it will not engage in any pool, trust, conspiracy or discrimination which is prohibited by the anti-trust laws of the State of Missouri, and it has likewise agreed as a part of its rights, powers and privileges to make the affidavit of innocence, as is required by the laws of Missouri. All other domestic corporations are dealt with in the same way, are accorded the same privileges and are subject to the same regulations and requirements. Therefore we say that all members of the class to which the plaintiff in error belongs, namely, domestic business corporations, have exactly the same rights and are subject to the same obligations and requirements. There is absolutely no discrimination as between the component parts of the class to which plaintiff in error belongs. The now complaint considered as presented upon the record before this court is that the plaintiff in error, being a corporation, should not be required to make the affidavit of innocence because such affidavit is not required of individuals or partnerships engaged in the same line of business. We respectfully submit that the authorities are clear which give to the State the right and power to make the classification as stated; and having the right and power to make such classification, there can be no objection when the State chooses to exercise those rights or powers.

The Supreme Court of Missouri has clearly settled the propositions here considered.

In State ex rel. v. Mallinckrodt Chemical Works, 249 Mo. 702, l. c. 733, 734, the court in banc, in speaking through Woodson, J., stated the rule as follows:

> "VIII. Counsel for appellant challenge the constitutionality of said section 10322, the contention being that it violates the Fourteenth Amendment of the Constitution of the United States, in that it denies to the appellant and its officers the equal protection of the laws by requiring them to make the affidavit mentioned therein, and at the same time exempting therefrom all 'partnerships, individuals or association of individuals who may be engaged in the same character of business.'
>
> "This precise question was presented and ruled on adversely to the contention of appellant in the case of State ex inf. v. Standard Oil Co., 218 Mo. 1. At page 368, we said:
>
> " 'Their position is that those sections are in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.
>
> " 'In one sense that may be true, but it is not true in a legal sense.

"'A corporation is a legal fiction—a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the State, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises. That the State has the power to enforce this agreement, or law of forfeiture, is not questioned by respondents, but they insist that it is a different and greater punishment than is imposed upon an individual for the commission of the same offense. In answer to that, it may be said that an individual is a natural person, created by his Maker, and not by law, and, therefore, has no franchise to exercise or to forfeit, consequently the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

* * * * * * *

"And, in passing, we might state that experience has taught the courts, both State and Federal, that fines alone are ineffectual to destroy pools, trusts, conspiracies and combinations in restraint of trade, in limiting production and in fixing and maintaining prices.

"In order to accomplish that end, the strong arm of the criminal law will have to be resorted to, and the guilty be incarcerated.

"That case was carried to the Supreme

Court of the United States, and was by that court affirmed.

"Those cases, as previously stated, decide this question against appellant's contention here, and we see no reason for changing our views of the law regarding the same."

We, therefore, respectfully submit that the plaintiff in error has not been denied that equal protection of the laws in this proceeding, to which it is entitled under the Federal Constitution.

III.

The 5th assignment of error made by plaintiff in error is as follows (Tr. p. 72):

"5TH ASSIGNMENT OF ERROR.

"The said Surpeme Court of Missouri erred in affirming the judgment of the said Circuit Court, City of St. Louis, because the affidavit prescribed by the Statute of Missouri mentioned in the petition in this case is not '*due process of law*' to enforce the local law, because the same discriminates against defendant as a business corporation in favor of partnerships, individuals or association of individuals who are not required to make such affidavit; and thereby '*due process of law*' and rights, privileges and immunities of appellant (plaintiff in error) are denied to it by said affirmance of judgment contrary to the Constitution of the United States (14th Amendment thereof), as well as to each of its managing officers."

Plaintiff in error claims that by virtue of this proceeding it has been denied "*due process of law*," as is guaranteed to it by the federal Constitution. We have heretofore shown that no question of "*due process of law*" has been preserved by the record in this case. The plaintiff in error did not present the question to the lower court in its answer, neither did it present or preserve the question in its instructions which were requested of the lower court. The question is not preserved or presented to the lower court, except (if at all) by the motion for a new trial and the motion in arrest of judgment. We, therefore, respectfully submit that the question of "*due process of law*," which the plaintiff in error now urges for the reversal of judgment in this case, is not preserved and cannot now be presented for the consideration of this court. (Dubowsky v. Binggeli, 258 Mo. 197: 202.)

At this point we desire to ask: Why did the plaintiff in error not make and file the affidavit when requested by the secretary of state and as required by the laws of the State of Missouri? In the brief of plaintiff in error, at pages 20-31, inclusive, we have several reasons assigned which are intended to be in answer to this question. We beg to state that not one of the reasons assigned in its brief by the plaintiff in error has any ground or foundation in the record of this case. At page 20 plaintiff in error claims that the affidavit required it to state that it has not issued and does not own any trust certificate, is not "*due process of law.*" At page 23 it says that the affidavit sent by the secretary of state and required by the statute is unchangeable and places the sworn date of the incorporation of plaintiff in error at a later date than the date on which it was actually incorporated

and it being impossible to make the affidavit, without changing the date, therefore, it is denied "*due process of law.*" At page 26 it says that the law of Missouri inflexibly demands the use of the blank affidavit as mailed by the secretary of state, and in that affidavit the venue is said to be in a "*county*" and the jurat in a "*county*"; that the plaintiff in error is not located in any "*county*" in the State of Missouri, but is located and transacting business in the "*City of St. Louis,*" and that the "*City of St. Louis*" is neither a "*county*" nor any part of a "*county,*" and, therefore, it could not make the affidavit in question, without making those changes.

To these contentions there are two complete answers: one is found in the law which governs and controls this matter, the other is found in the record of this case.

Let us observe the record and ascertain, if possible, if these objections as now urged in this court, have any foundation in the record of this case. Frankly we state they have not. The essential reason which the secretary and managing officer of the plaintiff in error gave for refusing to make the affidavit as required by law, is found in the testimony of that officer, in the record at pages 27, 28 and 29. The secretary of plaintiff in error in testifying said that he did not make the affidavit required by law; that no one else made same for his company. Then this question was asked: "*Q. You failed to do it intentionally, didn't you?* The witness answered: "*Yes, I omitted it.*" "*Q. On purpose?*" "*A. Yes.*" The witness did not pretend to say at any time that he did not make the affidavit for any of the reason as now urged by plaintiff in error in points I, II and III, above mentioned. The only reason assigned by this witness for not making the

affidavit was given by this witness in answer to the following question: "Q. *You have stated that you purposely refrained from filling out and swearing to the affidavit on the reverse side of the report. State what your purpose was in thus refraining from doing it.*" This witness answered: "*A. I didn't believe we were obliged to answer it.*" "*Q. For what reason did you think you were not obliged to make the affidavit?*" "*A. I only did it on the general theory that we didn't have to make answer to everything asked us.*"

We, therefore, respectfully submit that there is no foundation in the record of this case to support the several assignments of error above mentioned. But assuming that the record did support those assignments, then we say, under the law, they should not be heard or considered by this court as being sufficient to reverse the judgment. It is true, the form of the affidavit set out in the transcript (page 24) shows that the venue is the State of Missouri, "*County*" of ..... It is *not* true that the date prescribed by the affidavit as being the date on which the corporation was organized was fixed at 19.... On this point plaintiff in error says the affidavit could not be made because it was organized in 1882. That would make the first two figures of the year "18..," but it says the form sent out contained the figures "19....," and as the law prescribed the form was not to be changed, plaintiff in error now argues that it was impossible for it to make the affidavit because the facts properly stated would require a change in the form. We respectfully submit that this argument is not supported by the record, *first*, the form of the affidavit which is set out as exhibit in plaintiff's transcript disprove it. That form reads thus: "*Duly incorporated under*

the laws of..... on the..... day of..... and now transacting or conducting business in the State of Missouri" etc. So. under this form, there is no foundation for plaintiff's contention on this point. *Secondly*, we insist that the style of the venue was proper. Section 8057 R. S. of Missouri, 1909, sub-div. 19, expressly provides that where in any general statute of Missouri the word "*county*" is used, then it shall apply to and include the "*City of St. Louis*," so that city is included. The reason of this is plain. The city of St. Louis includes the territory that would ordinarliy be included in a county. It has its separate organization under the laws of Missouri, and under the general laws of Missouri is treated as a county.

These are matters of local concern, and the interpretation of these local laws by the Supreme Court of Missouri, the court of last resort, is controlling upon this court. Such construction or interpretation does not present to this court any federal question whatever. As to whether or not a State statute is repugnant to the State Constitution does not present a federal question. Such matters belong wholly to the State court of last resort, and its construction is binding on this court. In re Kemmler, 136 U. S. 436, at page 447, this court said: "The decision of the State court sustaining the validity of the act under the State Constitution is not re-examinable here." Again, in Rassmussen v. Idaho, 181 U. S. 198, l. c. 200, this court said: "The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legislation and the Constitution of the State, and it is not within the province of this court to review that question." Also, in Merchants Bank v. Penn., 167 U. S. 461, l. c. 462-3, this court,

in speaking through Mr. Justice Brewer, said: "It is sufficient to say in reference to this contention that the decision of the Supreme Court of Pennsylvania sustaining the statute is conclusive in this court, as to any qeustion of conflict between it and the State Constitution." Citing cases. (See other cases, points I, II, III and IV of our Points and Authorities.)

It is likewise well established by this court that this court will accept the interpretation and construction placed upon a State statute by the State court of last resort as conclusive upon this court as to the meaning, purpose and intent of the statute.

One of the leading, as well as one of the strongest, cases in point is found in *Louisiana* v. *Pillsbury*, 105 U. S. 278, where the court, in speaking through Mr. Justice Field at page 294, said:

> "Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. * * * * This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. *So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construc-*

> *tion of its own State, and enforced in accordance with it in all cases arising under it. Christy* v. *Pridgeon*, 4 Wall, 196, and *Shelby* v. *Guy*, 11. Wheat. 361." (Italics ours.)

The above doctrine is supported by all of the opinions of this court rendered since it was announced. Some of those leading cases are given under point III of our Points and Authorities.

It is now necessary for us to notice what the Supreme Court of Missouri has said in reference to the contentions of plaintiff in error now under consideration.

See State ex rel. Jones, Circuit Attorney v. Mallinckrodt Chemical Works, 249 Mo. 702, where, at local pages 732 *et seq.* these questions have been fully considered and decided adversely by the Supreme Court of the State of Missouri to the contentions there and now made by the plaintiff in error. We respectfully submit that upon the law here cited, the plaintiff in error cannot urge with success the questions here considered for a reversal of the judgment of the Supreme Court of Missouri.

IV.

At pages 36 *et seqr.* of the brief of plaintiff in error we find a discussion of its claim that section 10325 R. S. Mo. does not provide immunity for the person who makes the affidavit of innocence on behalf of the corporation.

Among other cases, State ex rel. v. Simmons Hdwe. Co., 109 Mo. 118, is cited in support of that contention. It is true that in the Simmons Hardware case the Supreme Court of Missouri held uncon-

stitutional a statute which had *no immunity* whatever offered the person making the affidavit. That opinion was written by Mr. Justice Barclay, now of counsel for plaintiff in error. We frankly concede that the opinion based upon the statute as it then existed was correct, but after that opinion was rendered and the statute declared *unconstitutional because no immunity* was granted to any officer making the affidavit or to any person testifying on behalf of the State in any prosecutions that may be brought under the anti-trust act, the legislature by proper amendments provided immunity agreeable to the decision of the Supreme Court of Missouri in the Simmons Hardware case. That immunity provides for two contingencies: one to protect the officer making the affidavit, as required by the statute; the other protects any witness who may testify in any proceeding brought against the corporation under the anti-trust statutes. Here we are only concerned with the first provision. That is as follows: "*Provided that no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article.*" Plaintiff in error now says that this immunity clause is not sufficiently broad enough to protect its officers. Before attempting to discuss the merits of this contention, it is well to observe that no such contention was made in the trial court at any stage of its proceedings. It is not preserved for this court and was not properly preserved for the Supreme Court of Missouri. It is true the matter was briefed and argued by the plaintiff in error before the Supreme Court of Missouri, and it is also true that the Supreme Court of Missouri discussed the question and held adversely to the contention of plaintiff in error.

We respectfully submit that these questions were never properly before the Supreme Court of Missouri, and in referring to or deciding the questions mentioned, the Supreme Court of Missouri acted beyond its proper jurisdiction; all that was said upon that question was in law purely *obiter*. The Supreme Court of Missouri has repeatedly held that it will not consider or decide a question that was not properly raised and presented to the lower court for its decision. The Supreme Court of Missouri, in entertaining appellate jurisdiction, is only a court of errors and can only review and consider such errors as are alleged to have been made by the lower court and properly preserved by the record for the consideration of the Supreme Court. This doctrine is supported by the universal rule of the Missouri Supreme Court. We beg to cite the following cases in support of that doctrine: Cases found X

The plaintiff in error complains and says that the immumity clause granted by section 10325 R. S. Mo. 1909 was wholly insufficient to protect its officers from possible prosecution, if they should make the affidavit required by sections 10322 and 10323. This contention is untenable. The statute prescribes the rule and commands obedience thereto. The affidavit is made in conformity with the statute and states only those things required by the statute. The form of the affidavit cannot be changed under the statute in dealing with those material things required to be stated by the statutes. Therefore, if the affidavit is made at all, it must be made substantially as sent out, without modification in any material respect. If the corporation has not entered into any pool, trust, conspiracy or combination prohibited by the statute, then the affidavit can safely be made by the officer, and would only be liable in case of a false

affidavit. The immunity clause of the statute provides him ample and complete protection when it declares "*That no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article.*" The court will observe that the things required by this affidavit are limited, are clearly within the terms of the statute, and if the affidavit is truthfully made, then there is nothing that could or would in any manner involve the affiant or subject him to any prosecution. No forfeiture of any kind is imposed on any such affiant by the anti-trust laws. This is vastly different from the matter covered by the second proviso in the statute, which covers all matters in which an officer of a corporation may be called upon to testify. It is apparent that one testifying would go into details and would cover much more ground than is demanded by the affidavit in question; he would also be required to produce, identify and explain books, papers, letters, etc. So, therefore, the immunity clauses of this section are widely different, made necessary, however, because of the different matters covered by those clauses.

The Supreme Court of Missouri recognized this in passing on the case in question. That decision should not be disturbed on that point. State ex rel. Jones v. Mallinckrodt Chemical Works, 249 Mo. 702, l. c. 735 *et seqr.* People ex rel. v. Foundry and Iron Co., 201 Ill. 236. Jack v. Kansas 199, U. S. 272. Brown v. Walker 161 U. S. 596. Hale v. Henkel, 201 U. S. 43.

CONCLUSION.

From the foregoing arguments and authorities we beg to submit that the judgment of the Supreme Court of Missouri should be affirmed, or the writ dismissed.

It is apparent that no federal question is properly presented upon the record in this case. We insist that in order for this court to be vested with jurisdiction in the premises the record must disclose and preserve a federal question (authorities under point I). No such question has been properly preserved in the record, and when analyzed in the light of the record, we find that the Supreme Court of Missouri may well rest its decision upon matters other than those which involves a federal question. (Berea College v. Ky., 211 U. S. 45, and cases cited under point VII). The statutes in question are presumed to be valid (cases point VIII). They are within the authority of the General Assembly of Missouri to enact, (cases point V) and, likewise, the State of Missouri has the right and power to prescribe punishment for the violations of her anti-trust statutes (cases point VII). The statutes referred to herein are wholly reasonable and do not violate any provision of the federal Constitution (cases point IX); the classification made by the statute, requiring only corporations to make the anti-trust affidavit, is clearly within the power of the State to make (cases point X). The Supreme Court of Missouri has placed its construction upon the statutes in question, and that construction will be adopted by this court (cases point III); the procedure in this case which was had in the state courts has been held to be

regular and proper by the Supreme Court of Missouri, and that holding is binding on this court (cases point XII); and, likewise, the Supreme Court of Missouri has established the facts in this case by its judgment and decree, and those facts will be accepted as conclusive by this court (cases point IV). The plaintiff in error has been granted due process of law in this case, as well as the equal protection of the laws, as is guaranteed to it by the federal Constitution (cases points XIII and XV). We respectfully submit that the judgment of the Supreme Court of Missouri in this case should be affirmed. The State created the corporation; endowed it with its powers, and placed obligations upon it which it, as a creation of the State, was bound under the law to observe. (State ex rel v. Mallinckrodt Chemical Works 249 Mo. 702, l. c. 733, point VIII). It has violated the law of its existence. It refused, without cause, to make the affidavit in question. When called to account by such refusal by the suit instituted in this case, it still refused to make or file the affidavit in question. Under the first proviso of Section 10322 R. S. Mo. 1909 the plaintiff in error may have filed the affidavit required by the provisions of that article prior to the rendition of the final judgment in the case, and if such had been done, then by the express terms of that section the court would assess against the corporation in lieu of a judgment forfeiting its charter a fine not to exceed five thousand dollars and not less than one hundred dollars; and it is further provided in said section by the second proviso thereof that if at any time before final judgment the corporation shall file with the secretary of state the affidavit prescribed by said section, then the trial court may in its discretion and for good cause shown,

upon the payment of all costs, together with the attorney's fee of ten dollars, to be paid the prosecuting attorney or the circuit attorney of St. Louis, remit the penalty therein prescribed.

This enables corporations which innocently offend against the law to relieve themselves from the extreme penalties provided by the law for failure to comply with the law and furnish the affidavit of innocence, as is required. In this case the secretary has testified that he did not make the affidavit as required, because he did not think he was required to make it, and furthermore because *he did not intend to make it.* It was a cold, bold, defiant violation of the law. Even after judgment was rendered in the lower court, the law extended clemency to the offending corporation; but notwithstanding the clemency extended, the corporation refused to accept the conditions upon which it might avoid a forfeiture of its charter. Notwithstanding it had the right and power to obtain clemency, it refused to either ask clemency or to comply with the requirements of law that would entitle it to clemency. Having defiantly violated the law of its existence, as it did, and as this court must hold it did by the finding of the Supreme Court of the State of Missouri, as well as upon the record, then we suggest that the corporation has forfeited its right to exist; it has offended against the law of its creation, and has defiantly refused obedience or submission to that law. We, therefore, say that the judgment in this case was just and right and that it should be affirmed. Corporations should understand that they do not rise above the law of their creation; that at all times they owe obedience to the sovereign power that gave them existence, and if they refuse that obedience, then their right to exist should cease.

We respectfully submit that this case should be affirmed, or the writ of error be dismissed.

Respectfully submitted,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

NO. 187

MALLINCKRODT CHEMICAL WORKS
Plaintiff in Error

vs.

THE STATE OF MISSOURI, at the Relation of SEEBERT G. JONES, Circuit Attorney of the City of St. Louis

State's Action to Forfeit Charter File No. 23,728

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

REPLY BRIEF FOR PLAINTIFF IN ERROR

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(23,728)

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REPLY BRIEF FOR PLAINTIFF IN ERROR

The severity of the penalty imposed upon plaintiff in error by the judgment in the State Court, for omitting to file a prescribed affidavit of innocence, admonishes us to submit some suggestions in reply to the learned brief for the State presented in this Court by its four able and distinguished representatives. We cannot permit any suitable occasion to pass which might afford opportunity to enforce or illustrate our contentions, or to parry the points advanced in support of the judgments below.

With all due respect, we believe several serious misapprehensions of the proceedings appear to have crept into the able adversary Brief, doubtless by inadvertence. Especially noticeable are those in relation to the **Procedure** which seems to have invited much the larger part of the learned discussion therein.

I

Federal Rights and Immunities Claimed

It is asserted, in substance and effect, in several parts of the elaborate Brief for the State (pp. 23-26), and is declared literally in one passage thus (pp. 25-6):

> "that there is not one federal question which the plaintiff in error has raised with any certainty in the proceedings in the state courts."

For reply thereto, we refer, with much deference, to the following evidences in the printed record of various efforts to invoke for plaintiff in error the immunities and guaranties afforded by the federal organic law, and particularly to point out the provisions of the 14th Amendment as a bar to these proceedings by the State to forfeit the charter of the plaintiff in error.

At the Beginning

1. By **demurrer** (Tr., p. 9) in the 5th ground thereof wherein defendant "cited the 14th Amendment of the Constitution of the United States as a bar to the allegations of said petition" (Tr., p. 9).

2. By the **answer**, wherein defendant pleads (in the 4th defense) and refers to the same ("14th Amendment of the Constitution of the United States") as a bar to the allegations of the petition.

At the Trial

3. By objection to the introduction of any evidence (Tr., p. 14) because the petition does not state a cause of action on the ground that the requirement is unconstitutional.

4. By a binding instruction requested for a finding

for defendant (Tr., p. 31) under the pleadings (which include the 4th defense in the answer, citing the 14th Amendment in bar of the action (Tr., p. 9).

5. By a declaration of law (the 2nd) requested by defendant (Tr., p. 31) expressly referring to the 14th Amendment, and claiming

> "that the rights of defendant under that amendment are infringed and invaded by this action in so far as the same may be intended to punish or to impose any forfeiture on defendant for failure to make such affidavit as is mentioned in section 10322 (Mo. R. S. 1909)."

After the Trial

6. By defendant's **Motion for New Trial** (Tr., pp. 32-4) wherein appear the following (among other assignments):

> "2. The Court erred at the trial in refusing to give the second request for an instruction or declaration of law as asked by the defendant."
>
> "14. The finding of the Court is erroneous because in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."
>
> "16. The finding of the Court is erroneous because it disregards rights of defendant under the Constitution of the United States, in that it deprives deant of property without due process of law, contrary to the 14th Amendment to said Constitution."
>
> "18. The Court erred in finding for plaintiff and thereby denying to defendant rights and immunities claimed by de-

fendant in said action under the 14th Amendment to the Constitution of the United States."

7. By defendant's **Motion in Arrest** of Judgment (Tr., p. 34) wherein appear the following (among other assignments):

"8. The finding and verdict of the Court are insufficient to support any judgment because same are in violation of immunities and rights of said defendant under the 14th Amendment to the Constitution of the United States."

"10. The finding and verdict of the Court are insufficient to support any judgment because same disregard rights of defendant under the Constitution of the United States, in that same deprive defendant of property without due process of law, contrary to the 14th Amendment of said Constitution."

"12. The finding and verdict of the Court are insufficient to support any judgment because same deny to defendant rights and immunities claimed by defendant in said action under the 14th Amendment to the Constitution of the United States."

Note: It should be remarked, in passing, that in Missouri, the assignments of error in the Motion for New Trial form the basis for review on appeal to the State Courts of appeal, as to all proceedings at the trial.

Hatcher v. Moore, 51 Mo. 115

Bartlett v. Veach, 128 Mo. 91

In the State Supreme Court

8. By the **Assignments of Error** filed by defendant in the State Supreme Court (before the hearing there) the following points and appeals to the protection of the federal organic law (Tr. pp. 36-40) appear:

"VIII. The Court erred in overruling each of the grounds of the demurrer to the petition" (because the 5th ground of demurrer invokes the protection of the "14th Amendment of the Constitution of the United States," (Tr., p. 9).

"X. The Court erred in denying to defendant the equal protection of the laws under the Constitution of the United States, 14th Amendment thereof, by entering judgment of forfeiture, and thereby disregarding the rights, privileges and immunities of defendant and of its managing officers under the Constitution and Laws of the United States."

"XI. The Court erred in overruling the motion in arrest of judgment." (That motion assigned federal grounds already mentioned.)

"XII. The Court erred in overruling the motion for new trial." (That motion alleges grounds of federal law already quoted.)

"XIV. The Court erred in refusing the second instruction asked by defendant at the trial." (That instruction, Tr., p. 31, raises a federal question.)

"XX. The trial Court, by refusing the per-

emptory instruction for defendant, denied to defendant and its officers the equal protection of the laws guaranteed to them by the 14th Amendment to the Federal Constitution, and denied to defendant and its officers their rights and immunities thereby secured, in that it is unreasonable and oppressive to require corporate officers to make such an affidavit of innocence, and yet to leave (Tr., p. 39) every 'partnership, individual or association of individuals' (also within the law against monopolies, sections 10299, 10303) in the same situation and circumstances immune from such requirement."

"XXV. The affidavit prescribed by the statute is **not 'due process of law'** to enforce the anti-trust law, as it requires oath before a county officer in the City of St. Louis; and **makes the ownership of any 'trust certificates' unlawful"** (Tr., p. 40).

(All of the foregoing objections to the preceding on federal grounds were interposed before the decision by the Supreme Court of Missouri.)

9. By the **Motion for Rehearing** (after the decision reported, 249 Mo. 714) the attention of the Court was called by plaintiff in error to the avoidance and ignoring of some of the federal points submitted, and this re-statement of the point was made (as also a reference to

the 1st Brief in that Court) as follows (Tr., p. 66):

"4. The Court inadvertently omitted to notice the assignment of error by appellant in which it is claimed that the affidavit required by the statute is not **'due process of law'**, because it demands a sworn statement that the defendant **'does not own any trust certificates'**."

(Then follows, in that Motion, considerable argument on that point, Tr., pp. 66-67.)

10. By the **Motion for Rehearing** are repeated distinctly our federal points; and those which were not discussed in the learned opinion of that Court were reiterated (Tr., pp. 65-66.)

11. The **Assignments of Error** (on the writ of error now before this Court) present quite fully the objections of plaintiff in error to the prior record and proceedings, on exclusively federal grounds, following literally the venerable judiciary Act now sec. 23 of the Judicial Code of 1912 (Tr., pp. 71-72).

The learned Brief for the State, in endeavoring to show that the steps taken by defendant were insufficient to raise a federal question, claims (p. 27) that **"the demurrer was waived"** by the answer filed after the demurrer was overruled (assigning the 14th Amendment to the federal Constitution as a bar to the allegations of the petition, Tr., p. 9). In that claim, learned counsel for the State seem to lose sight of the local law which provides (R. S., Mo., 1909):

"Sec. 1804. **What objections deemed waived, and what not.** When any of the matters enumerated in section 1800 do not appear upon the face of

the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

The matters enumerated in section 1800 are certain special defenses, indicated by the terms thereof (R. S. Mo., 1909) as follows:

"Sec. 1800. **Defendant may demur for what causes.** The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of action; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

So that if the petition **fails to state a cause of action,** because of the terms of the 14th Amendment to the Constitution of the United States (as assigned in the demurrer, Tr., p. 9), that point certainly was not waived or abandoned, by filing an answer after the demurrer was overruled.

Paddock v. Somes, 102 Mo. 235;
Hoffman v. McCracken, 168 Mo. 337;
Lilly v. Menke, 126 Mo. 190.

Moreover, the **answer** (by its 4th paragraph) set up exactly the same federal objection "as a bar to the allegations of the petition" (Tr., p. 9). Yet our learned and honored friends who represent Missouri assert that:

> "no federal question is properly presented upon the record in this case" (Brief, p. 59).

How would they have such questions presented to the trial court?

A matter of federal or national right is always one of **law**, pure and simple.

The terms of the constitution are matters of which all courts take judicial notice. They need not be pleaded.

They are designed and intended to protect those, to whom they apply, against any and all invasions of the rights which the constitution deems worthy of such solemn and supreme protection.

The "equal protection of the laws" and "due process of law," which are guaranteed by the 14th Amendment, are difficult of exact definition. How better may those rights be asserted than by referring specifically to the Amendment itself, as a **"bar"** to an attempt to invade, limit or destroy the right or rights protected by that Amendment? That was done for defendant in this case by the *demurrer* and later by the **answer** to the petition (Tr., p. 9). Was not that sufficient to advise the trial Court, the world and adversary counsel that defendant invoked the rights protected by that Amendment?

The learned opinion of the Supreme Court of Missouri discloses that some federal questions were considered as properly raised, for they are discussed and decided therein (Tr., pp. 56-7).

The record from beginning to end contains evidences that defendant relied upon federal immunities and rights to protect the enjoyment of its franchise to conduct the business of manufacturing chemicals, and especially cited and relied upon the guaranties to those rights and immunities by the 14th Amendment against state action invading them, and finally denying them, and destroying its franchise.

Your Honors have a daily familiarity with this topic, and we would not venture, in this presence, to formulate a rule concerning it. Yet it may be appropriate to cite one of our home rulings on the subject, with which the learned law officers of Missouri are doubtless familiar, and which indicates how substance rather than form is to be considered in ascertaining whether or not constitutional guaranties have been invoked in the progress of litigation in the courts:

> "It was not necessary to set out in the answer the sections of either constitution, or to refer to them by their numbers. The whole theory of our code of civil procedure is, that the parties must plead facts and the courts must apply the law to the facts pleaded and proved. It is enough that the record shows that in the disposition of the appeal there is involved the construction of some provision of the Constitution of the United States or of this State."

State v. St. Louis Court of Appeals, 97 Mo. 281.

Many decisions of this Court are familiar to your Honors declaring the same principle of procedure.

When the obvious effect of a ruling below is to deny a right secured by the constitution, it is often unnecessary to cite the terms of the latter specifically. It is enough if the right was clearly claimed and denied.

There are few better tests of the essential features of the procedure on this point than are afforded by the terms of the Judiciary Act itself (secs. 236, 237, Judicial Code) concerning the review of the judgments of the highest courts of the several States.

R. Co. v. McWhister, 229 U. S. 265

With all due respect, we submit that the federal rights and immunities guaranteed to defendant by the 14th Amendment were properly and seasonably claimed and referred to as defenses, and are entitled to be weighed and adjudicated here.

II

Touching our first specification of error: that the state statute requiring the affidavit of innocence is not "*due process of law*," the discussion in the learned Brief for the State is meager.

It seems (Brief, p. 51) to be claimed for the State that because the secretary of defendant, who testified on its behalf, said that he omitted to file the affidavit "intentionally", "on purpose", *ergo*, the constitutional immunity in respect of "due process of law" (under the 14th Amendment) is waived, lost or inapplicable to protect defendant's franchise.

The same witness later gave his reason for declining to file the affidavit demanded:

> "I did not believe we were obliged to answer it" (Tr., p. 28).

So far from his testimony indicating any waiver of the rights of defendant, its effect is rather to show that he was insisting on its rights and immunities, against

being obliged to answer the questions which the affidavit propounds.

We would respectfully disabuse the minds of any learned counsel who imagine that the refusal to make the affidavit was "a **cold, bold, defiant** violation of the law" (Brief, p. 61). The evidence to support such a charge it might have been appropriate to point out.

We find no such evidence.

The secretary of defendant testified that he "did not believe we were obliged to make it".

Our contention is and has always been that he was correct.

There certainly is no evidence, that we can find in this record, to suggest any want of good faith in his declining to make the affidavit. His testimony affords no tenable ground on which to base a claim of any waiver or withdrawal of the constitutional rights of defendant in the circumstances, whatever those rights may be.

We have sought somewhat anxiously, throughout the learned Brief for the State, to find something applicable (beyond the suggestion above discussed) to our contention that the local enactment in question is "**due process of law**" while demanding of some managing officer of defendant an affidavit,

> "**that it has not issued and does not own any trust certificates**"
> (R. S. Mo. 1909, sec. 10,322)

We have sought to find in that learned brief of 62 pages some explanation of the meaning of that requirement.

Was it intended to forbid, under penalty of disfranchisement, the purchase of **any and all sorts of trust certificates?**

What sort of trust certificates were intended thereby?

Nothing on these points is vouchsafed! Despite the distinguished ability of learned counsel the uncertainty pointed out heretofore in those terms remains as uncertain as ever. We are bound to suppose and to assume that there is no explanation of the meaning of those terms to be given, even by most eminent counsel. What then of the plain, ordinary business layman, confronted with a demand for an oath to a statement so vague, uncertain and indefinite, on its face, that the highest law office of his State, when solemnly invited, does not attempt to explain or elucidate it!! Might he not well hesitate, if he was a careful and sincere man in the use of his oath? He could not be sure of the meaning of that language which he was required to use in his affidavit, without variation.

We have propounded the question whether a requirement so ambiguous, indefinite and vague, in a penal enactment, is "due **process of law.**" We consider that the answer is to be found in two recent decisions of this Court already cited, the application of which to this case has aroused no comment by learned counsel for the State.

Where a law is **so obscure in its phraseology** (in defining a basis to forfeit valuable property rights or to impose other penalties) as to "prescribe **no standard of conduct that it was possible to know**", it is not "due process of law."

Collins v. Kentucky, 234 U. S. 638
Intern. Harvester Co. v. Kentucky, 234 U. S. 223
U. S. v. Cantril, 4 Cranch 167

We have been given no reason toward diverting the

application of that principle of law from the case made in the record at bar.

The rule above quoted is sound as a precept of interpretation of all enactments.

Law is a rule of conduct. When what is put out in the garb of law is deficient in that substance which is essential to its being as a rule of conduct, it is not law, but mere jargon. An enactment must be sufficiently clear to be susceptible at least of interpretation as a rule of conduct, before it is really a law or "due process of law." What is the word of command which this law gives forth, as to "trust certificates"? Is it sufficiently clear to point a line or path for obedience?

The most learned of the Apostles wrote:

> "8. For if the trumpet give an uncertain sound, who shall prepare himself to the battle?
>
> "9. So likewise ye, except ye utter by the tongue words easy to be understood, how shall it be known what is spoken? for ye shall speak into the air."
>
> St. Paul, I Corinth. 14; 8, 9

The mere form of an enactment which does not use words within the fair range of ordinary understanding is but speaking "into the air".

> "If an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means for carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative."
>
> Hilburn v. R. Co., 23 Mont. 241

To quote a summary of established jurisprudence of this subject:

"When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void; for if no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain."

26 A. & E. Ency. L. (2d ed.), pp. 656-7

Many decisions are cited to those propositions.

It has been held, in a very late case, that want of "due process of law" may arise either from the fact that the law attempted to be enforced is void or that the forms of law have not been observed.

R. Co. v. Railroad Commission, 169 S. W. 1038

These precepts have peculiar force as applied to enactments imposing punishments or forfeitures.

In Alabama an enactment attempted to define dog stealing as larceny (whether grand or petit was not stated), but the Court *held* the act was no law at all on account of its indefiniteness, saying:

"The court imposed punishment as in grand larceny. While there was no warrant for this, there was equally no warrant for the imposition of punishment as for petit larceny. The court was directed by the act to punish as in other cases of larceny; but whether as in cases of petit larceny or grand larceny it did not and could not know. This court cannot and does not know which the legislature intended. It is past all finding out. The act, in other words, creates an offense, but it fails to affix any certain punishment. The court, being unable to certainly impose an authorized punishment, was not authorized to impose any punish-

ment. The motion in arrest of judgment should have been granted."

Johnston v. State, 100 Ala. 32 (14 So. 629)

An instructive case, in the home state of the litigation now at bar, exhibits the application therein of the rule we invoke. Discussing the ambiguity in an enactment attempting to impose a license, the Court said:

> "Whether the license provided for in the act is to issue and run for a day, month, or a year, or for life of the applicant, or for the duration of his business at a fixed place, nothing is to be found in the act to inform one, and again we are driven to the field of conjecture and speculation, without data upon which to predicate a construction as to what is meant. We know of no rule of construction that would justify this court giving to this act a definite meaning not somewhere disclosed or indicated within its four corners. The act is clearly void for uncertainty" (p. 393).
>
> * * * * * * * *
>
> "While the Legislature under its vested authority and power may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the constitution, or that will entitle it to the designation of 'the law of the land', or that will make the act 'due process of law', by which alone the liberty of the citizens may be restrained, or his property burdened or disposed of."

State v. Ashbrook, 154 Mo. 393, 395

Those decisions could be supplemented by many others to prove how essential to "due process of law" is sufficient clearness in the enactment to permit those called on to obey it and to enforce it to be advised of the command it imports. We believe that defendant was not obliged to obey such an unintelligible and obscure requirement, and we hope your Honors will so declare.

III.

The requirement in the affidavit as to date of incorporation made the enactment void, and not "due process of law".

We have claimed that, as applied by the Supreme Court of Missouri, the law requiring this affidavit is invalid, because it demands an **impossibility**. That claim is fully outlined in our first Brief (pp. 13-14; 23-25).

We have been met for answer by a curious suggestion in the learned Brief for the State (pp. 52-3) namely, that the form of required affidavit (set out as an exhibit, Tr., p. 24) omits the "19...."; and *ergo* "there is no foundation for plaintiff's contention on this point" (p. 53).

Our reply thereto is that the statute (sec. 10,322) contains the prescribed and unchangeable form for the affidavit, including "19....", as part thereof, and other sections of the chapter refer and demand the "affidavit prescribed" or "required by this article" (secs. 10,322, 10,323-4), and permit nothing else. The Supreme Court of Missouri has not intimated that any change therein is permissible by the affiant, or by the Secretary of State.

The petition (Tr., p. 7), sets forth the demanded af-

fidavit, with "19...." in it, as does also the learned opinion of the Supreme Court (Tr., p. 44). If, therefore, as now ingeniously suggested at the eleventh hour, by the learned Brief for the State, the blank for affidavit tendered by the honored Secretary of State **omits that part** of the affidavit, "19....", then the condition on which alone the affidavit could be required, namely, the enclosure to defendant of the "form of affidavit" as **"prescribed herein"**, has not been observed. It would obviously not be "due process of law" to impose a forfeiture of a charter when the statutory form for affidavit had not been sent to defendant to be sworn to.

The defendant was required by the law to make the affidavit literally set forth in the supposed statute which includes the form with "19...." therein. We respectfully submit that the distinguished Secretary of State had no power to alter the procrustean form. An attempt to do so would be but a confession of the point we insist upon, namely: that, as "required" and "prescribed", the form is impossible of performance or observance by corporations like defendant, incorporated before "19...."; or it **is not intended to be applicable to such corporations.**

In either event, it would be but arbitrary action and not "due process of law" to enforce the statute so as to deprive defendant of its property and franchise in the circumstances, and on the undisputed facts in this record, when no such form as the statute describes was sent to defendant for verification.

CONCLUSION

We must hasten to conclude and no longer to abuse your patience. Only our anxiety for the rights of our

client, and our firm belief in the merit of our appeal to this Court have led us to extend the argument to this limit. We ask pardon for so doing, but some points in the learned Brief for the State seemed to invite reply, lest silence on our part might be supposed to imply acquiescence. We believe that the other matters in that learned Brief are sufficiently met by our first Brief in this Court. We refer again to that discussion and to our specifications of error for full development of our contentions.

We pray that the judgment of the State Supreme Court be reversed with such further orders as may seem just and proper.

S. Mayner Wallace
Wm. R. Orthwein
Shepard Barclay
Attorneys and of Counsel for Plaintiff in Error

St. Louis, March, 1915

MALLINCKRODT CHEMICAL WORKS *v.* STATE OF MISSOURI, AT THE RELATION OF JONES, CIRCUIT ATTORNEY OF CITY OF ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 187. Argued March 10, 1915.—Decided June 1, 1915.

If it appears from the opinion of the trial court, that the question of equal protection, under the Fourteenth Amendment, was treated as sufficiently raised and specifically dealt with adversely to plaintiff in error, jurisdiction is conferred on this court under § 237, Judicial Code.